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No. 86-686

In the Supreme Court

OF THE

United States

OCTOBER TERM 1986

HYDROPOOL and COGENERATION SERVICES, INC.,
Appellants,

VS.

CALIFORNIA PUBLIC UTILITIES COMMISSION
and
PACIFIC GAS and ELECTRIC COMPANY,
Appellees.

On Appeal From The Supreme Court of California

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee, Pacific Gas and Electric Company ("PGandE" or "Company") moves to dismiss the appeal filed by Appellants Hydropool and Cogeneration Services, Inc., ("Hydropool") on the ground that it does not present a substantial federal question. Sup. Ct. R. 16.1(b). This motion also presents several additional reasons why this case should not be set for oral argument. Sup. Ct. R. 16.1(d).

STATEMENT OF THE CASE

This case arises from actions of the California Public Utilities Commission ("CPUC" or "Commission") in implementing rules and regulations pursuant to the Public Utilities Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3, concerning small power producers. In April, 1984, the Commission issued Order Instituting Investigation ("OII") No. 84-04-077 for the purpose of determining whether transmission constraints existed which would impair the development of Qualifying Facility ("QF")

power[1]. PGandE responded that it had transmission constraints in the northern portion of its service territory. Upgrades to eliminate these constraints would take five to seven years to build. In order to expedite the connection of QFs in less time, PGandE, the CPUC Staff, and QF representatives negotiated and the CPUC adopted the "Interim Solution." App. A.

The Interim Solution responded to an immediate crisis of QFs not being able to connect to the northern part of the PGandE system for up to seven years while specific transmission upgrades were built to accommodate that power. It requires PGandE, whenever necessary, to depart from its general obligation (absent certain factors) to dispatch electricity in the most economically efficient manner and authorizes PGandE to take whatever steps are necessary, including diseconomic dispatch, in order to take up to 1150 MW of QF power.

The Commission's unusual authorization to depart from economic dispatch was motivated in part by two mitigating features of the Interim Solution. The first is that the Solution was truly "Interim," in that PGandE was authorized and obligated to depart from economic dispatch only on a *temporary* basis. Second, PGandE agreed to build a specific set of transmission upgrades, which were set forth in the Interim Solution itself, and which would eliminate the need for uneconomic dispatch within five to seven years.

The Interim Solution as drafted was limited to QF projects within PGandE's service territory in Northern and Central California. Additionally, QFs *within* PGandE's service territory were excluded if they would connect to the Pit No. 1 transmission system or to the Humboldt transmission system (beyond 90 MW). App. A 5. The cost to the ratepayers of accommodating these QFs was sufficiently excessive to justify their exclusion. Thus the Interim Solution contained exclusions based on location in PGandE's service territory as well as outside of PGandE's service territory and made no distinction whatsoever based on location in or out of California.

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[1] Qualifying Facilities are small power producers who "qualify" under PURPA for certain pricing and purchase provisions.

Appellant moved that the Interim Solution be modified to include projects outside of PGandE's service area. Decision No. 84-08-037, approving the Interim Solution, did not settle the matter. That decision removed the restriction that QFs had to be located within PGandE's service area, noting that "at this time, we do not have sufficient cause" to retain the distinction. J.S. App. H 8. But in every other respect the decision accepted the position stated by the CPUC Public Staff and PGandE. As Decision No. 84-08-037 stated:

> However, we also find merit in the concern expressed by the Commission staff and PG&E that unlimited amounts of QF deliveries from outside PG&E's service territory could displace large amounts of more economic power. PG&E's ratepayers could suffer large losses if such displacement is permitted. J.S. App H 8.

The location of Hydropool's projects outside of California is not critical. What is significant is that Hydropool wanted to deliver power over the Pacific Southwest-Northwest Intertie, an extra high voltage transmission line authorized by Congress for the purpose of importing relatively inexpensive energy from the Pacific Northwest to California. The Intertie is different from other transmission lines, among other reasons, in that its primary purpose is to coordinate transactions between utilities, while other transmission lines get power from the source of generation to the load center.

All the major investor-owned utilities in California import cheap power over the Intertie, as do some publicly-owned utilities. Therefore, nearly all electric customers in California benefit from the lower cost power delivered over the Intertie. Hydropool wanted to deliver power over the Intertie at QF prices significantly higher than the low cost power for which the Intertie was built.

After the CPUC removed the service territory restriction, PGandE and a QF trade association, the Independent Energy Producers Association, petitioned for rehearing because of concern about direct displacement on the Intertie of low cost power by Hydropool and because permitting Hydropool's connection

was inconsistent with a second cornerstone of the Interim Solution. The Interim Solution was designed to be truly *temporary* because the specified upgrades would eliminate the need for uneconomic dispatch within five to seven years. However, there were no upgrades in the Interim Solution which would create more capacity on the Intertie. Therefore, if Hydropool was permitted to deliver power over the Intertie at its desired prices, the diseconomic dispatch would continue for twenty years and the cost to ratepayers, *already increased* by the Interim Solution, would increase even more.

In response, the Commission granted limited rehearing to determine whether the Interim Solution should apply to projects located out of the service territory connecting directly to the Intertie. PGandE presented evidence demonstrating that there would be no unused capacity on the Intertie for the next five years and that Hydropool's deliveries would therefore displace economy energy on a one-for-one basis. App. B 1-2.

On January 16, 1985, the Commission issued Decision No. 85-01-039 ordering additional hearings.[2] After those hearings, Administrative Law Judge Wu ("ALJ Wu") issued an order on July 30 describing the distinction between Hydropool's projects and other projects under the Interim Solution, differentiating between the Intertie and other transmission lines, and concluding that there was a basis for treating Hydropool differently. As ALJ Wu found, "direct interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PGandE's capacity entitlement."[3] App. H 25.

While this underlying dispute was being adjudicated, an unrelated issue arose concerning the Commission's prospective sus-

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[2] That decision noted that the issue could not be resolved in an expedited hearing. PGandE was precluded from making a showing and should this case be remanded would insist on its right to be heard. *California Trucking Association v. Public Utilities Commission*, 19 Cal.2d 240, 244 (1977).

[3] For convenience, a conformed copy of Decision No. 85-09-058 as modified by Decision No. 86-02-033 and incorporating the ALJ ruling is included as Appendix H.

pension of some of the terms under which QFs sell power to the utilities. Hydropool sought to sell power to PGandE under "Standard Offer No. 4," one of four standard Power Purchase Agreements devised by the Commission to facilitate power sales by QFs to utilities. Under Commission orders, the four Standard Offers were required to be offered by utilities to eligible QFs. Thus, the Standard Offers were creatures of regulation and not voluntary contracts freely negotiated between the parties.

In April, 1985, the CPUC suspended interim Standard Offer No. 4, stating that the costs to ratepayers were too high. J.S. App. J. In anticipation of the suspension, Hydropool submitted seven copies of Interim Standard Offer No. 4, allegedly as agent for certain QFs.[4] PGandE rejected these tendered Standard Offers for several reasons, including the fact that they were not appropriate for out-of-area projects, were not properly completed, and because Hydropool had no standing to tender Standard Offers unless and until the Commission ruled Hydropool eligible under the Interim Solution.[5]

Hydropool petitioned the Commission to be exempted from the suspension of Interim Standard Offer No. 4. App. C. In June 1985, the Commission issued Decision No. 85-06-163, stating that the decision on PGandE's Petition for Rehearing would determine whether Hydropool could deliver power under the Standard Offers tendered to PGandE. J.S. App. K 37, 44. Hydropool did not appeal this decision and it is final as a matter of law. Cal. Pub. Util. Code Section § 1709.

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[4] PGandE disputes Hydropool's eligibility for QF status, as well as its eligibility, apart from the present controversy, for the Interim Solution. The CPUC has not needed to rule on those questions, and they remain issues to be resolved in the event the case is remanded.

[5] Hydropool's assertion that the Commission has already rejected these arguments (J.S. 32n) is not correct. The Commission has not ruled on these questions and they remain outstanding issues. Furthermore, only the seven Standard Offers tendered by Hydropool on November 16, 1984 are part of the record in this case. Cal. Pub. Util. Code § 1757.

On September 18, 1985, the CPUC issued Decision No. 85-09-058 granting PGandE's Petition to exclude from the Interim Solution out-of-area QF projects proposing to connect to the Intertie north of Round Mountain Substation and ordering that a separate proceeding be established to determine prices to be paid for QF power delivered over the Intertie.[6] App. H. On October 18, Hydropool petitioned for rehearing, and on January 16, without waiting for CPUC action, filed a Petition for Writ of Review in the California Supreme Court.

On February 5, 1986, the Commission issued Decision No. 86-02-033 denying Hydropool's Petition for Rehearing and modifying Decision No. 85-09-058. App. H. In that Decision the Commission stated that it had never previously considered the issue of QFs connecting directly to the Intertie and noted that the avoided costs contained in the Standard Offers were never intended to be used by such QFs. Therefore, the Commission stated, Hydropool was never eligible for a Standard Offer No. 4.

On July 30, 1986, the California Supreme Court denied Hydropool's Petition for Writ of Review. J.S. App. A.

SUMMARY OF ARGUMENT

Pursuant to PURPA, 16 U.S.C. § 824a-3, the rules of the Federal Energy Regulatory Commission ("FERC") implementing PURPA, 18 C.F.R. § 292.401(a), and the FERC itself, the CPUC alone has the authority to determine the avoided costs under which QFs are paid for their power. The CPUC acted pursuant to this delegation when it opened a proceeding to determine for the first time the proper avoided costs for out-of-area QFs such as Hydropool which seek to connect on transmission lines used for the import of inexpensive energy. The CPUC recognized that in setting avoided costs in the past, it had never specifically considered cases such as Hydropool's.

At all times, the CPUC acted pursuant to its specific authority under a federal statute which left considerable authority to the states. The remedy which Hydropool seeks would disrupt this

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[6] In November, 1985 the Commission issued Order Instituting Investigation No. 85-11-008 to begin that process. App. D.

carefully constructed system and eviscerate the state's authority specifically delegated to it by federal law.

Contrary to Hydropool's contention, the CPUC decision does not impermissibly burden interstate commerce, either on its face or in practical effect. The exclusion of which the Hydropool complains applies with equal force to QFs in California located outside of PGandE's service territory. Moreover, the CPUC's action passes all applicable tests because Hydropool's project would have a demonstrably disproportionate impact on ratepayers. Therefore, there is a reason to treat Hydropool's product differently, apart from its state of origin, and the actions of the CPUC withstand even the stricter scrutiny which Hydropool incorrectly alleges should apply.

The CPUC has not unconstitutionally impaired Hydropool's purported contracts because no such contracts existed. Not required by PURPA, the Standard Offer is solely the creation of the Commission, which alone determines which QFs are eligible for it. Hydropool's case is not an example of retroactive interference by a regulatory body because the regulatory body at all relevant times deemed Hydropool ineligible to tender a Standard Offer. Furthermore, Hydropool's own actions demonstrate its ineligibility for the Standard Offer in question.

Finally, this appeal must be dismissed because the CPUC has opened a proceeding in which Hydropool will have the opportunity to obtain the relief it seeks.

Accordingly, there are no significant federal or constitutional issues here and there is no reason to note probable jurisdiction.

I

THE COMMISSION ACTED PURSUANT TO ITS EXCLUSIVE AUTHORITY UNDER PURPA.

A. PURPA Delegates To State Commissions The Determination Of Prices To Be Paid To QFs.

Hydropool argues that the Commission has violated PURPA and the Commerce Clause by refusing to require PGandE to purchase its power on the same terms and conditions under which

PGandE must purchase power from California QFs. However, there is no Commerce Clause issue here. The sole issue is whether the CPUC, pursuant to the authority delegated to it under PURPA and the FERC rules implementing PURPA, has the authority to determine the appropriate avoided costs. An unbroken line of authorities demonstrates that such power is properly delegated to the states and will not be reviewed by FERC.[7] Accordingly, Hydropool's Commerce Clause claim must fail in the face of this unambiguous delegation.

Under PURPA and the FERC rules implementing PURPA, the CPUC has jurisdiction to determine the price at which utilities purchase QF power. 16 U.S.C. § 824a-3(f), 18 C.F.R. § 292.401. Decision No. 85-09-058 excludes Hydropool from the Interim Solution because the prices contained in Standard Offer No. 4 may not be the proper prices for out-of-service area QFs connecting to the Intertie. Moreover, that decision establishes a proceeding to determine how and under what terms QFs *can* connect to the Intertie.

The new proceeding, OII 85-11-008, is an appropriate exercise of the Commission's authority to determine the proper avoided costs for payments to QFs:

> QFs located in the Pacific Northwest, the Southwest, and California's Imperial Valley want to wheel power to California utilities and take advantage of higher avoided cost rates than are offered by utilities in their regions. However, the actual avoided costs paid to out-of-service area and out-of-state QFs may differ from the avoided costs paid to other California QFs. If QFs wheel power over interties, their power might displace economy energy purchases which would cause economic harm for California's ratepayers. Maintaining ratepayer indifferences, as a result of accurate avoided cost, may require additional curtailment provisions or a different pricing structure than is available to in-service area QFs. App. D 1.

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[7] States must comply with the principles set forth in the FERC rules and may not, for example, set rates above avoided costs. That, however, is not an issue in this case.

Hydropool's suggestion that simply because its projects are located out of state that somehow the Commission loses its authority to determine the proper prices for Hydropool's power is totally without foundation.

This determination of the proper avoided costs is clearly within the Commission's jurisdiction. FERC enacted a series of regulations to implement PURPA. The FERC regulations stated that:

> Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C. . . . Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart. . . . 18 C.F.R. § 292.401.

Pursuant to this delegation, the CPUC issued several decisions establishing prices to be paid for QFs. However, the previous CPUC decisions did not address the prices to be paid for QFs delivering over the Intertie because, as the Commission stated, the issue never came up before.[8] App. H 15.

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[8] Hydropool argues that Decision No. 83-09-054, which adopted the prices in Standard Offer No. 4, already factored in economy energy. J.S. 17-18. That proceeding established systemwide average avoided costs and did not consider *direct* displacement of low cost power over an Intertie. Therefore, Decision No. 83-09-054 does not apply to the type of transaction Hydropool proposes. App. H 15.

When a utility purchases QF power from within its service area, that purchase typically displaces the utility's most expensive alternative source of generation. This is the basis for the standard avoided cost pricing. When, on the other hand, the utility purchases QF power from outside of its service area over a transmission line which is fully utilized, that purchase will displace purchases the utility would otherwise have made over that line. Since the utility will generally only have been making the displaced purchases if they are cheaper than its most expensive alternative, the true avoided cost of the displaced purchase will generally be less than the avoided cost of a purchase from a QF within the utility's service area. This is the basis of the investigation ordered by the CPUC in OII No. 85-11-008.

While states were obliged to implement these regulations, FERC stated this was not to be a one-time-only or static process:

> These rules afford the State regulatory authorities and nonregulated electric utilities great latitude in determining the manner of implementation of the Commission's rules, provided that the manner chosen is reasonably designed to implement the requirements of Subpart C. . . . The Commission also recognizes that economic and regulatory circumstances vary from State to State and utility to utility. (45 Federal Register pp. 12230-12231, February 25, 1980.)

Furthermore, FERC noted that PURPA does not require that all QFs be paid the same rate:

> Since the price to be paid for the purchase by the utility is dependent, in part, on the utility's avoided costs, and these costs will vary over time and with the number and magnitude of cogeneration arrangements previously entered into, the *rates paid will probably have to differ from one arrangement to another* depending on when they were entered into and what future costs are being avoided. [Emphasis added. 44 Federal Register, p. 38870, July 3, 1979; see also 18 C.F.R. § 292.304(c)(3)(ii).]

Therefore, the CPUC acted in accordance with the FERC regulations when it determined that connection of a QF to the Intertie was a situation which it had not formerly envisioned:

> The record nowhere indicates and, in fact, *contradicts* any notion that either the Commission, the Commission staff, the respondent utilities, or any QF *ever contemplated* that our Standard Offers applied to such interconnection, particularly in such circumstances. We do not know whether the institutionalized avoided cost of Standard Offer 4 is appropriate for a situation where, because of the Intertie interconnection, a QF's power of necessity will always displace

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The CPUC denied Hydropool's claims that low cost power was already reflected in avoided costs (App. H 15); the CPUC, which set these prices, ought to know what it considered in issuing Decision No. 83-09-054.

> economy power from the Northwest whenever such power is available to fill PG&E's capacity entitlement. We do not believe PURPA requires such a result, without convincing evidence that PG&E's avoided cost in such a situation is indeed equivalent to the Standard Offer 4. App. H 15.

Thus the CPUC's establishment of a proceeding to determine whether different prices might apply for out-of-service area deliveries over the Intertie such as Hydropool proposes was totally in accord with PURPA.

The primary role of the states in implementing these regulations is undisputed. *FERC* v. *Mississippi* 456 U.S. 742, 751 (1982). As this Court noted, the FERC regulations "afford state regulatory authorities . . . latitude in determining the manner in which the regulations are to be implemented." *Id.* at 751. That case also holds that PURPA delegates to the states the adjudication of "disputes arising under the statute." *Id.* at 760. In short, the CPUC is *correctly* implementing PURPA by establishing a proceeding to determine the proper avoided costs.

American Paper Institute v. *American Electric Power* 461 U.S. 402 (1983), cited by Hydropool (J.S. 10) for the proposition that PURPA requires "special incentives and assurances" for QFs provides little support for Hydropool. First of all, *American Paper Institute* held only that the full avoided cost rule "would not directly provide rate savings" to customers. *Id.* at 415. It does not permit or require increased costs to customers. Second, the Interim Solution, adopted as a Commission order in Decision No. 84-08-037, already acknowledges that ratepayer costs *without Hydropool* will be increased. App. A 4. Hydropool cannot seriously suggest that *American Paper* deprives the CPUC from determining that there be a limit to the increased costs.[9]

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[9] The CPUC's standard in setting QF prices is ratepayer indifference; that is, the ratepayers should be indifferent as to whether a QF supplies the power or a utility supplies the power. The Interim Solution (without Hydropool) departs from this standard by increasing ratepayer costs in order to obtain the benefits of QF power. Thus, without Hydropool, the Interim Solution is already consistent with the dicta in *American Paper*

In addition, *American Paper* stated that the primary purpose of PURPA was to decrease dependence on fossil fuel. *Id.* at 405. The power which Hydropool would displace is primarily hydroelectric power from the Northwest. App. B 2-3. Thus, there is no energy independence issue here.

In sum, the CPUC can determine the avoided costs to be paid for out-of-area projects delivering over the Intertie.

B. The Order Complies With The FERC's Requirements.

In promulgating its rules pursuant to PURPA, FERC delegated to state commissions the determination of the "avoided costs" on which QF payments were to be based. The FERC guidelines require neither that all payments be equal nor that standard offers be made available.

FERC described this delegation in *Middle South Services, Inc.*, 24 FERC ¶ 63,119, p. 65,209 (1982):

> Pursuant to Section 210(f) of PURPA, after the Commission's regulations have been issued, the duty falls upon each state regulatory authority, having jurisdiction over electric utilities for retail ratemaking purposes, to implement the regulations (citations omitted). It is a state regulatory authority, in the absence of a negotiated price agreement, which will ultimately determine the price to be paid by a utility to a qualifying facility for a purchase of electricity occurring in that particular state.
>
> The Commission's regulations, which endeavor to spell out the meaning of avoided costs, leave a lot of room for play in the joints. Each state authority, therefore, has wide discretion in weighing the factors specified in the regulations to determine avoided costs. (*See also*, 33 FERC ¶ 61,408 [1985].)

FERC has constantly refused to review the state's determination of prices paid to QFs. *Vermont Electric Cooperative, Inc.* v.

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that PURPA does not necessarily reduce ratepayer costs. The question is whether the CPUC can say enough is enough.

Vermont Public Service Board, 25 FERC ¶ 61,273 (1983); *Roche Products, Inc.*, 29 FERC ¶ 61,098 (1984).

FERC also refused to intervene in a case similar to this one in that the state regulatory body ordered a specific set of avoided costs applied to a particular transaction because the QF proposed to displace a specific power source. *Snow Mountain Pine Company* v. *C.P. National Corporation and Idaho Power*, 30 FERC ¶ 61,293 (1985).

Therefore, any suggestion by Hydropool that the CPUC exceeded its authority in denying Hydropool Standard Offer 4 prices under the Interim Solution must be rejected.

II

DECISION NO. 85-09-058 DOES NOT ILLEGALLY BURDEN INTERSTATE COMMERCE.

Hydropool also claims that the CPUC unlawfully burdened interstate commerce by refusing an out-of-state QF the same terms offered to in-state QFs. This claim cannot be sustained by either the facts or the law.

This Court recently summarized the standard for determining whether a state action violates the Commerce clause:

> In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," . . . statutes in the second group are subject to more demanding scrutiny. . . . [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means. *Maine* v. *Taylor*, 106 S.Ct. 2440, 2447-8 (1986)

The order from which Hydropool appeals at most burdens interstate commerce only incidentally. Moreover, the burden, if any, is not excessive relative to the local benefits.

A. No Distinction Was Made On The Basis Of Location In Or Out Of State.

Contrary to Hydropool's allegation, neither the Interim Solution as drafted nor PGandE's Petition for Modification (granted by Decision No. 85-09-058) made a distinction based on a QF project's location in or out of state. Rather, the distinction was based on location outside of PGandE's control area (which comprises much of Northern and Central California, but is hardly the entire state). That petition requested that:

> The interim solution will not apply to QFs located outside of PGandE's service territory whose output would flow on the Pacific Northwest-Southwest 500 kv intertie north of Round Mountain substation. J.S. App. N 5.

The Interim Solution also excluded QFs within California whose connection would expose ratepayers to excessive costs.[10]

Hydropool, incorrectly focusing on its own desired transmission path rather than on the actual terms of the order, argues that this restriction is a carefully drafted attempt to exclude out-of-state QFs without stating so directly. J.S. 25, Hydropool is wrong on the intent and wrong on the geography. The requested modification sought to accomplish exactly what it states—to exclude out-of-area QFs who want to connect directly to the Intertie regardless of state of origin. Round Mountain substation is located nearly 100 miles south of the Oregon border. J.S. App. U. Therefore QFs in the Northern tier of California (including Siskiyou, Del Norte, and Modoc Counties), but located outside of PGandE's service territory, were similarly excluded if they wished to connect directly to the Intertie.

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[10] Hydropool would thus have been excluded had it been located in California, but outside of PGandE's service territory and connecting on the Intertie north of Round Mountain.

Hydropool notes that the CPUC in Decision No. 85-09-058 discussed the issue of "out-of-state" QFs, and on that basis alleges that the CPUC intended to make such a distinction. However, when the CPUC pursuant to that Decision opened its investigation of the proper avoided costs for QFs delivering over the Intertie, the issue was framed not in terms of location in or out of state but, properly and consistently with PGandE's Petition for Modification, in terms of location in or out of a utility's service territory. App. D. Moreover, in modifying Decision No. 85-09-058, the CPUC left no doubt as to its intent:

> we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. App. H 15.

Hydropool's allegation that Decision No. 85-09-058 had the practical effect of an exclusion based on location out of state is incorrect. First, the exclusion also applied to California QFs.[11] Second, the Intertie is not the only connection with Oregon.[12] App. B 9-10.

Accordingly, the Decision did not discriminate against interstate commerce either on its face or by practical effect.

B. Even If Distinction Based On Location In Or Out Of California Can Be Established, There Are Countervailing Local Benefits.

Assuming *arguendo* that the Commission's actions have the incidental effect on interstate commerce alleged by Hydropool, that action "will be upheld unless the burden imposed on such

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[11] No QFs in PGandE's service territory were connected directly to the Intertie (App. B 7), nor does the record show that any QFs in PGandE's service territory are permitted to connect directly to the Intertie under the Interim Solution.

[12] It may be the only practical connection for Hydropool, but that is not the point. The question is not whether Hydropool can connect, but whether out-of-state QFs were excluded based solely on location.

commerce is clearly excessive in relation to the particular local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Commission's actions, in balancing the interests of the 10,000,000 residents of PGandE's service territory against a single entrepreneur, clearly meet that test. The Commission, in using "scarce interstate transmission resources for the maximum benefit of the ratepayer" App. H 15, is properly exercising its undisputed authority under California law to ensure that utility rates are "just and reasonable." Cal. Pub. Util. Code Section 451.

This Court has consistently acknowledged the state interest in utility regulation and low rates to consumers. As this Court held in *Arkansas Electric Coop. v. Arkansas Public Service Company*, 461 U.S. 375, 377 (1983):

> the regulation of utilities is one of the most important of the functions associated with the police power of the States.

Similarly, in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), this Court noted:

> The passthrough prohibition plainly bore a rationale relationship to the *State's legitimate purpose of protecting consumers from excessive prices. Id.* at 196 (Emphasis added).

The interest of the states in utility regulation is not diminished by PURPA. As this Court acknowledged, PURPA "*permits* the States to play a continued role in the utilities field, and gives full force to the States' ultimate policy choices." *FERC* v. *Mississippi*, *op. cit*, *supra* at 754n.[13]

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[13] Hydropool also alleges that the decisions of the CPUC frustrate national energy policy. But national energy policy is comprised of more than just QFs and PURPA. The transmission line over which Hydropool seeks to force PGandE to accept its overpriced power is a congressionally authorized line designed to import inexpensive energy to California. Most of that energy comes from the Bonneville Power Administration, a federal agency. App. B 2-3. The enhanced transmission capability over the Intertie, to which Hydropool alludes, is also being pursued pursuant to federal directive and may not be economically justified (and therefore may not be built) if its owners are forced to take high cost power rather than low cost power. App. B 6.

Therefore, the local benefits considered by the CPUC justified its actions.

Similarly, this Court held:

> A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause. *Minnesota* v. *Cloverleaf Creamery*, 449 U.S. 456, 474 (1980).

In that case, this Court concluded that any burden on interstate commerce was not excessive since the product would still flow across state lines. In this case, power will still flow across state lines so interstate commerce is not burdened.

Hydropool cites *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982), as support for the proposition that protecting ratepayers from higher rates is not a legitimate local purpose. J.S. 52. However, *New England* does not support Hydropool's argument.

New England holds that a state cannot keep limited natural resources for the benefit of its own citizens. *Id.* at 338-39. However, in this instance the Commission is not barring anything from entering or leaving the state. Hydropool can sell power to PGandE from its projects App. H 14; the issue is the appropriate terms for the transaction. To be analogous to the state action struck down in *New England*, the Commission would have had to limit a party's right to contract under any circumstances for the sale or purchase of power.

C. There Can Be No Commerce Clause Violation Where, As Here, There Is A Reason To Treat Hydropool's Power Differently Apart From Its Origin.

Hydropool suggests that the CPUC's actions was motivated by economic protectionism to develop California's own small power industry to the detriment of developers in other states. J.S. 52.

When economic protectionism is the motive for a ban on imports, the action will be deemed invalid *per se*. *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). However, the law must be examined to determine whether the motive is economic protectionism or whether it is a law directed at legitimate local concerns with only an incidental effect on interstate commerce. A state may not discriminate against articles of commerce coming from outside the state "unless there is some reason, *apart from their origin*, to treat them differently." *Id.* at 627 (emphasis added). Where, as here, the exclusion is due to a reason unrelated to state of origin—namely, differential displacement of economy energy—the statute is merely subject to the local benefit test. *Id.* at 624.

When economic protectionism is *not* the motive, a state statute is not necessarily invalid (or subjected to a stricter scrutiny) even if as a practical matter it burdens only out-of-state entities. *Exxon* v. *Governor of Maryland*, 437 U.S. 117 (1978). In that case, this Court affirmed a Maryland statute requiring all refiners to divest themselves from ownership of Maryland retail gas stations. The refiners termed this statute an impermissible burden on interstate commerce because all refiners who owned retail stations were in fact interstate companies. *Id.* at 125. This Court rejected that argument, holding that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id.* at 127.

Hydropool's situation is analogous. Since there is limited capacity on the Intertie, any power not supplied by Hydropool will be supplied by other, in this case lower cost, interstate suppliers. As *Exxon* held, the Commerce clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-128.[14]

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[14] Hydropool's claim that its participation would enhance the interstate power market (J.S. 44) ignores the fact that it is seeking to impose on PGandE's ratepayers power at prices far in excess of market value while ironically displacing market-priced power.

Even if the burden of regulation falls solely on interstate companies the Court has found that that fact alone does not lead to conclusion that a state has discriminated against interstate commerce. *Id.* at 125. Accordingly, even assuming Hydropool has demonstrated a distinction in practical effect, the Commission did not violate the Interstate Commerce Clause.

1. Even Under Stricter Scrutiny, The Decision Of The Trier Of Fact Will Not Be Disturbed.

Because the CPUC's actions neither discriminated against out of state companies nor were motivated by economic protectionism, the stricter test mandated by *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979) does not apply. However, even under that stricter scrutiny, the Commissioner's actions will be upheld.

Under *Maine* v. *Taylor*, if a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate soon that action serves a "legitimate local purpose" and that this purpose could not be served as well by available nondiscriminatory reasons. *supra* at 2448. However, "[t]he empirical component of that scrutiny, like any other form of fact finding, is the basic responsibility of the [trial] courts, rather than appellate courts." *Id.* at 2451. The Commission provided the factual basis for granting PGandE's Petition for Modification. App. H 14-15, 19-26. Moreover, under California law, the "findings of fact by the Commission are to be accorded the same weight that is given to jury verdicts." *Toward Utility Rate Normalization* v. *Public Utilities Commission*, 22 Cal.3d 529, 537-38 (1978); *see also*, Cal. Pub. Util. Code § 1757. As this Court held in *Maine* v. *Taylor*, "no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case." *Id.* at 2451.

2. The Commission Established A Clear Factual Basis For Treating Out-Of-Area Projects Differently

Notwithstanding the unambiguous holding that this Court will not relitigate the facts in exercising even the stricter scrutiny in Commerce Clause analysis required in *Maine* v. *Taylor* (where, unlike here, there was an outright ban on out of state imports),

Hydropool attempts to minimize the significance of the Commission's factual basis for distinguishing between Hydropool and QFs within PGandE's service territory.

The Commission correctly established a factual basis on which to treat Hydropool and other out-of-area QFs differently. Contrary to Hydropool's claim that in-state QF power will also flow on the Intertie and have the same effect (J.S. 6) QFs connecting within California will not have the same detrimental effect on ratepayers as would Hydropool. Furthermore, the ALJ ruling is not based on a minor technical issue (J.S. 48); it addresses the differential displacement caused by Hydropool's projects and is the central issue in this case.

Hydropool argues that the ALJ, having made this distinction, did not recommend Hydropool's exclusion. J.S. 36-7, 46. However, a CPUC Administrative Law Judge lacks the authority to make a dispositive ruling, but may "rule upon all objections or motions which do not involve final determination of proceedings." Title 20, Cal. Admin. Code § 63. Therefore, the ALJ exercised his lawful authority in referring the matter to the full Commission.

Hydropool asserts that in-state QFs are as likely to displace economy power as Hydropool (J.S. 6, 46). However, the record clearly demonstrates that Hydropool will cause greater displacement. First, any displacement of economy energy caused by Interim Solution projects would at worst be temporary until the specified transmission upgrades are completed in five to seven years. Displacement caused by Hydropool will continue throughout the twenty-year life of the Hydropool contracts, not just for five to seven years. When the specified upgrades are completed, the Interim Solution QFs will not cause any diseconomic operation. App. B 8. Hydropool's assumption as to additional Intertie capacity must be rejected; any such capacity may well not be built if it cannot be used for low cost power.

Second, Hydropool's projects will cause displacement at least in the spring every year assuming average year hydro conditions and for longer periods of time in above average hydro conditions. App. H 24-25. Hydropool's estimated figures of PGandE's usage

of the Intertie was determined on the basis of average utilization over the course of an entire year, ignoring the periods in which the Intertie would be totally utilized and during which Hydropool's projects would displace economy energy on a one-for-one basis. Hydropool's witness conceded "there could be additional backoffs on the Intertie from a QF that was connected to it." App. B 4-5.

Therefore, there was sufficient evidence for the Commission to find that Hydropool's projects would cause a greater backdown of low cost power than would QFs under the Interim Solution.

Moreover, projects under the Interim Solution would not have an equal effect. PGandE has alternatives which could reduce the backdowns of low cost power caused by Interim Solution projects. PGandE "would look at a combination of measures cutting back our own generation within the northern area and/or cutting back on Northwest imports." J.S. App. X 371. With Hydropool's projects, PGandE has no alternatives but to back down cheaper power.

PGandE further demonstrated that in-area QFs would at the most displace only 0.15 MW of low cost power for each 1.0 MW they generate, while Hydropool would displace as much energy as it generates. The 1150 MW of QFs under the Interim Solution are distributed all over PGandE's northern divisions. Only a small portion affects the Intertie flow south from Round Mountain Substation.[15] Therefore, Hydropool would displace seven times as much low cost energy as would the in-area QFs under the Interim Solution.

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[15] In the circle insert in Ex. 20, Attachment 2 (App.E), 12 MW flows through the Round Mountain transformer bank from the 500 kV bus *to* the 230 kV bus with only the existing 196 MW of northern QFs. In Attachment 4, with an aditional 1150 MW of QFs (1346 MW total), the power flow reverses and 163 MW flows from the 230 kV bus to the 500 kV bus. This means that adding 1150 MW of QFs add 175 MW (12 MW + 163 MW) to the Intertie flow south from Round Mountain Substation. In other words, each MW of QF added under the Interim Solution displaces only about 0.15 MW (175 ÷ 1150 MW) of economy energy import.

Hydropool alleges that the Commission's actions must be deemed invalid for failure to pursue "available nondiscriminatory alternatives." *Maine* v. *Taylor*, *op. cit*, *supra*, at 2448. J.S. 36, 50. In fact, PGandE offered an alternative point of interconnection to Hydropool which it rejected for its own business reasons. App. B 11-13. Moreover, whatever the merits of Hydropool's own proffered (and preferred) alternatives, its proposals for banking and curtailment are inconsistent with its assertion that it has a constitutional right to a non-negotiable agreement which lacks these terms.

Finally, the Commission provided an available nondiscriminatory alternative in opening OII 85-11-008 to determine the appropriate terms and conditions for purchases from out-of-area QFs. In that proceeding Hydropool will be able to propose a standard offer or the banking and curtailment offer proposed above. This constitutes a "reasonable effort" to accommodate Hydropool. *Maine* v. *Taylor*, *Id.* at 2453. *Maine* v. *Taylor* does not require a state to choose between the lesser of two non-negotiable offers and specifically rejected as not falling within the ambit of an "available nondiscriminatory alternative" a proposal which was new, unproven, and, like Hydropool's vague offer, contained an "uncertain cost." *Id.*

In sum, the stricter scrutiny required by *Maine* v. *Taylor*, where an outright import ban was nevertheless sustained, should not even be necessary in this case. However, even assuming that such a scrutiny is appropriate, the CPUC's actions do not violate the Commerce Clause.

III

THE CPUC DID NOT IMPERMISSIBLY IMPAIR ANY CONTRACTS.

Hydropool's second claim is that the CPUC unconstitutionally impaired existing contracts between PGandE and Hydropool. However, no such contracts ever existed. Even if Hydropool had contracts with PGandE, in the context of the highly regulated electric utility industry, the CPUC's action was acceptable.

A. No Contracts Between PGandE And Hydropool Existed.

Under modern Contract Clause jurisprudence, the first determination is whether the state action actually impairs a contractual relationship. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978); *United States Trust* v. *New Jersey*, 431 U.S. 1, 17 (1977). Obviously, if the "contract" allegedly affected by the state action does not exist, there has been no impairment.

Although normally the question of whether a contract exists is one of state law, when a state statute is challenged as an unconstitutional impairment of contract, the question of whether the contract exists becomes a federal one. *Atlantic Coast Line* v. *Phillips*, 332 U.S. 168, 170 (1947); *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561 (1942). This is true whether the contract arguably in existence is created by state action and runs directly between the state and some other party (*Phillips*, *supra* at 169-70) or is a private contract (*Irving Trust*, *supra* at 557-60).

Even where the state is one of the contracting parties, this Court defers to the state's view:

> when we are dealing with a matter of local policy . . . we should be slow to depart from the [local court's] judgment, if there was no real oppression or manifest wrong in the result. . . . It is not for [this Court] to read such a local law with independent but innocent eyes, heedless of a construction placed upon it by the local courts. *Phillips*, *supra* at 170.

The Commission's view on whether contracts in fact existed between Hydropool and PGandE is therefore entitled to some deference from this Court. Deference is more appropriate in this case, where the alleged contracts are between two private parties, than in *Phillips*. There is less reason to treat the state's determinations with suspicion when, as here, the state does not have a direct financial interest in the matter. *Energy Reserves Group, Inc.* v. *Kansas Power & Light*, 459 U.S. 400, 412 n. 14 (1983).

1. Hydropool Did Not Obtain Standard Offers Because Its Projects Were Not Eligible For Standard Offers.

The Standard Offer which forms the basis of Hydropool's contract clause claim was created by the Commission to facilitate

power sales by eligible QFs to California utilities. J.S. App. C. Any resulting agreements are not the result of a true meeting of the minds between the QF and the utility. Rather, the Commission requires that the Standard Offers be offered by the utility to eligible QFs. They are deemed by the Commission to be binding once the eligible QF has completed the Standard Offers correctly and fulfilled certain other requirements. J.S. App. K.

In this case, no contracts were ever formed. PGandE at all times disputed Hydropool's eligibility for the Standard Offers and the Commission determined Hydropool ineligible. App. H 14. Even Hydropool acknowledged when it tendered the Standard Offers that their validity depended on the resolution of the underlying dispute. As Hydropool's letter purporting to transmit the seven Standard Offers states: "As previously mentioned, we are willing to make the power purchase agreements final, *subject to* a decision from the PUC regarding PGandE's petition for modification of Decision 84-08-037." (emphasis added) App. F 3.

Hydropool's contract claim is based on events in another CPUC proceeding. In April, 1985, the Commission suspended Standard Offer No. 4 because under it ratepayers were required to pay too much for QF power. Hydropool petitioned for modification of the suspension order, requesting that Hydropool's tendered Standard Offers be exempted from the suspension if Hydropool was otherwise permitted to connect in OII No. 84-04-077, an event that never came to pass. App. C 6. Hydropool was concerned that otherwise it might have litigated its case on the merits in OII No. 84-04-077 in vain because of the suspension. Specifically, Hydropool asked the CPUC to:

> modify D. 85-04-075 to provide that the suspension of Standard Offer 4 does not apply to the fourteen Hydropool projects totaling 66.2 megawatts; and that interim Standard Offer 4 *may* be available to them upon a decision in Case No. I.84-04-077 denying PGandE's Petition for Modification of D.84-08-037. (emphasis added.) App. C 6.

Obviously, by *granting* PGandE's Petition for Modification of Decision No. 84-08-037, rather than denying it, the CPUC found that the tendered Standard Offers were not valid.

The Commission has never held that the Hydropool contracts were valid. It stated repeatedly that:

> The status of any interim Standard Offer 4 agreements tendered by Cogenerations Services, Inc. and Hydropool to PG&E prior to April 17, 1985, *shall be determined by the outcome of the Commission's decision on PG&E's petition for modification of D.84-08-037 in I. 84-04-077.* (J.S. App. K 47, emphasis added.)

That decision is now final and is res judicata in this proceeding.[16] Cal. Pub. Utilities Code § 1709.

Notwithstanding Hydropool's specific exclusion from the general ruling of Decision No. 85-06-163, Hydropool continues to argue that the decision nevertheless created a right which was unconstitutionally abrogated. That position was dismissed by the CPUC:

- We stated in D.85-06-163, the Orphan Contracts decision, that resolution of PG&E's Petition to Modify would determine the ability of Hydropool to enter Standard Offer 4 agreements with PG&E. Our decision to grant PG&E's Petition means, of course, that Hydropool does not have the ability to enter Standard Offer 4 agreements under the terms of the interim solution, as long as its interconnection is through the Intertie. App. H 14.

Clearly, Hydropool never had a right to tender a Standard Offer. Therefore, it cannot now argue that the Standard Offers it submitted created contracts which were later abrogated.

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[16] Hydropool argues that the Commission singled it out for different treatment in this decision, J.S. 30. Hydropool fails to note that it requested that it be treated differently.

2. Hydropool Has No Contract Because Standard Offer Forms Cannot Be Used For Out-Of-Area QFs And Hydropool Wanted To Vary The Terms Of The Standard Offer.

Even if Hydropool were eligible under the relevant Commission decisions for Standard Offer No. 4, the forms submitted to PGandE did not create contracts between Hydropool and PGandE because Standard Offer forms cannot be used for out of area projects for technical problems independent of the underlying dispute and because Hydropool itself proposed to deviate from the Standard Offers.

a. Standard Offer Forms Are Inappropriate For Out-Of-Area Projects Such As Hydropool's.

Hydropool's submitted Standard Offers are not binding because those forms are inappropriate for out-of-area projects. Hydropool admitted these tendered offers were nothing but placeholders in anticipation of a suspension. App. B 111. Because purchase agreements with out-of-area projects necessarily involve unique issues of scheduling, metering, and interconnection, non-standard contracts must be separately negotiated which deal with these issues. As PGandE informed Hydropool

> You also state in your November 26 letter that you recognize the need for additional "agreements" between Hydropool and PGandE to address these circumstances that are unique to delivery of wheeled power to Malin (i.e., metering, scheduling, etc. . . .), rather than direct interconnection to the PGandE transmission system. This is essentially correct, although those "agreements" must be embodied in the Power Purchase Agreements and not in separate documents. For that reason, a standard power purchase agreement is not workable for out-of-area projects. J.S. App. T 2.

Accordingly, these forms could not be used for out-of-area projects.

b. The Standard Offers Were Not Applicable Because Hydropool Had Requested Nonstandard Offers.

Finally, Hydropool has not accepted a Standard Offer because at all times Hydropool has wanted something other than a Standard Offer. The only contract that is available to an eligible QF without negotiation is a Standard Offer as approved by the CPUC. Even the slightest change to a Standard Offer renders it nonstandard, and no longer available to a QF at the QF's option. App. G 4. Hydropool wants a nonstandard offer, whereby output would be "banked and stored." J.S. 36, 50. Whatever the merits of Hydropool's offer, its terms are inconsistent with the Standard Offers, which do not permit such flexibility.

Because of inadequacies in the documents themselves when used for out-of-area QF projects and Hydropool's expressed desire to obtain nonstandard terms, Hydropool's submitted Standard Offers did not create contracts between PGandE and Hydropool.

B. Even If Hydropool's Submittal of Standard Offers Created Binding Contracts, The Commission's Actions Have Not Unconstitutionally Impaired Those Contracts.

Assuming *arguendo* that a contract exists, in considering a Contract Clause challenge to a state action, the court must determine whether the complained of state action actually impairs the existing contractual relationship. *Allied Structural Steel Co.* v. *Spannaus*, *op. cit.*, *supra* at 244; *United States Trust* v. *New Jersey*, *op. cit.*, *supra* at 17

If it does, then in order to survive a Contract Clause challenge, the "'[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption'." *Spannaus*, *op. cit.*, *supra* at 244 (citing *United States Trust*, *op. cit.*, *supra* at 22). If the state regulation constitutes a substantial impairment, the State must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic prob-

lem. *Energy Reserves Group, Inc.* v. *Kansas Power & Light, op. cit., supra* at 411-12.

In determining the extent of the impairment, the Court considers whether the industry the complaining party has entered into has been regulated in the past. *Id.* at 411. Unless the state itself is a contracting party, this Court defers to the legislative judgment as to the necessity and reasonableness of a particular measure. *Id.* at 412-13.

1. California's Actions Protect Significant And Legitimate State Interests.

California's action here unquestionably protects significant and legitimate state interests. The Commission, by not allowing Hydropool's projects to interconnect to the Intertie under Standard Offer No. 4, was protecting the state's ratepayers from an unintended increase in energy prices. Protecting ratepayers from excessive rates is a significant and legitimate state interest. *Id.* at 416-17.

2. The Two Modern Cases In Which A Contract Clause Challenge Was Successful Are Distinguishable From The Present Controversy.

United States Trust Co. v. *New Jersey, op. cit., supra*, and *Allied Structural Steel Co.* v. *Spannaus, op. cit., supra*, are the only two modern cases in which a Contract Clause challenge to a state action was successful. Both cases are easily distinguishable from the present controversy.

In *United States Trust* the state itself was a contracting party. If one of the contracting parties is the State, it is very likely that the Court will hold a State to its contractual obligations. *Energy Reserves, op. cit., supra* at 412 n. 14. Here California is not a party to the contracts. Therefore, deference to California as to the necessity and reasonableness of its action is appropriate. *Id.* at 412-13.

In *Spannaus* the objectionable feature of the Minnesota legislation, which was intended to protect employees in the state, was that it affected only a small subset of employers. *Spannaus, op. cit., supra* at 250. The legislation caused the pensions of certain employees to vest sooner than they otherwise would have, but did

not affect employers who provided no pension plan whatsoever, or offer any protection for their employees. Thus the legislation was ironically more likely to harm those employers who had made some attempt to protect employees already. *Id.* at 250.

Here, on the other hand, California's goal is to protect a broad social interest, the ability of a significant portion of the state's ratepayers to obtain fair electric rates. Further, those affected by the Commission's actions, such as Hydropool, are those who would most directly cause the problem.

In its attempt to gain this Court's attention, Hydropool purports to demonstrate that there are some current issues in contract law which this Court must resolve. However fascinating these issues may be in the abstract, this is hardly the case in which to resolve them, when, as here, the facts so overwhelmingly demonstrate that no contract exists, that the CPUC has properly determined that Hydropool is ineligible for the contract in question, and that the contract in question was never intended by any of the parties to this proceeding, including the appellant, to govern this transaction.

IV

THIS APPEAL MUST BE DISMISSED FOR WANT OF RIPENESS BECAUSE THERE IS AN EXISTING ADMINISTRATIVE PROCEEDING IN WHICH APPELLANTS WILL HAVE THE OPPORTUNITY TO OBTAIN A REMEDY.

Hydropool's appeal must be dismissed because it is not ripe; the issue in dispute, the price paid to out-of-area QFs wishing to deliver over the Intertie, is before the proper administrative body, the CPUC. In November 1985, the CPUC issued OII No. 85-11-008 to determine *for the first time* the proper prices to be paid for QF delivery over the Intertie. App. D. OII No. 85-11-008 is the proper proceeding (under the CPUC's authority under PURPA to establish prices paid to QFs) for Hydropool to obtain relief.

When, as here, a controversy is not ripe for adjudication because of a pending administrative proceeding, this Court must reject the appeal. *Dump Truck Owners Assn.* v. *Public Util. Comm'n*, 434 U.S. 9 (1977). In that case, this Court dismissed

an appeal of a Commission's action because the proceeding was reopened. In the instant case, the Commission has opened a proceeding to resolve the true issue here—the proper prices for QF power delivered directly over the Intertie. Therefore, Hydropool has not been foreclosed from the California marketplace and an administrative proceeding exists to determine the proper terms and conditions under which Hydropool may enter the California market.

V

CONCLUSION

For the reasons stated above, Hydropool is entitled to no relief whatsoever and its Appeal should be dismissed.

Respectfully submitted,
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APPENDIX A

OII 84-04-077

STIPULATION AND ORDER

INTRODUCTION

A. On April 18, 1984, the California Public Utilities Commission ("Commission") issued Order Instituting Investigation ("OII") 84-04-077 in response to information received by it that Pacific Gas and Electric Company ("PGandE") is experiencing or expected to experience limitations on portions of its transmission system and that the limitations could restrict the ability of PGandE to accept power from Qualifying Facilities ("QFs") in areas served by those portions of PGandE's transmission system.

B. San Diego Gas and Electric Company, Southern California Edison Company, Sierra Pacific Power Company, and Pacific Power and Light have represented that they do not have, or do not expect to have significant transmission limitations affecting their ability to accept QF generation.

C. PGandE, the Commission Staff and QF representatives met on June 8, 15, and 19, 1984 to discuss the PGandE transmission system contraints. All parties involved exercised due diligence in developing the terms of the agreement which is the basis of this stipulation. No party present at the prehearing conference on June 22, 1984 objected to the use of an agreement as the basis for an interim solution. This stipulation establishes an interim solution to transmission contraints in the Northern Portion of PGandE's service area (as defined in Finding of Fact 1) to allow QF development to proceed until the Commission completes the investigation in OII 84-04-077.

D. This stipulation applies only to QFs in the Northern Portion of PGandE's service area and does not affect QFs in the other portion of the service territory nor does this order bind other California utilities.

E. The stipulation does not predetermine any of the issues in the pending OII 84-04-077, establish the position of any party during the proceeding or assign the ultimate cost responsibility for

the upgrades necessary to alleviate the transmission constraints in the PGandE service area.

F. The terms of the stipulation will be in effect from the Commission adoption of the interim decision until the final Commission determination at the completion of the investigation.

G. The QF assessment agreed upon in this stipulation will apply to all QFs signing Power Purchase Agreements and who have paid for detailed interconnection studies from the effective date of this Order until the Commission implements the cost allocation for the transmission system upgrades as determined in OII 84-04-077.

H. Any and all changes in operating practices necessary for PGandE to accept QF power are authorized until the upgrades are built which eliminate the need for such practices or until the Commission determines otherwise.

I. In order for QF development to proceed pending the Commission resolution of OII 84-04-077, QFs otherwise affected by these limitations will be assessed 1.7 mills/kwh in return for PGandE's taking the power. PGandE will be able to proceed with specified transmission upgrades with full reasonable cost recovery authorized by the Commission. PGandE will take whatever operating steps are ordered by the Commission in order to accommodate QF power deliveries during the interim period. Ratepayers will receive the longterm benefits on QF power.

J. The parties to this stipulation understand that this is a negotiated solution and that each party had to compromise in order to reach agreement.

K. The parties to this agreement respectfully request that the Commission adopt an interim order in this matter which includes the proposed findings of fact and conclusions of law attached to this stipulation:

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER

FINDINGS OF FACT

1. PGandE is experiencing or expects to experience bulk transmission constraints in the northern portion of its service area.

Under PGandE's assumptions regarding anticipated load and resources, including expected levels of QF generation, from this time forward the capacity of PGandE's northern bulk transmission facilities will be exceeded during certain hours of each year. The Northern Portion of PGandE's service area affected by this stipulation is defined in this Order as that area north of a line running from the Golden Gate to the Carquinez Straits to the Sacramento River east of Antioch and then running southeast to pass just west and south of PGandE's Bellota substation.

2. PGandE also reached similar conclusions about its area transmission system in the following six operating divisions: Humbolt, Shasta, De Sabla, Colgate, North Bay, and Drum. The area transmission systems are directly affected by the location, size, and timing of the QFs seeking to sell power to PGandE.

3. Increasing the capacity of both the bulk and certain area transmission systems (as listed in Attachments 1 and 2) is estimated by PGandE to cost approximately $185 million in 1984 dollars. The upgrades, if all are completed, are estimated by PGandE to accommodate approximately 1150 MW of additional QF development. Completion of all of these upgrades may take five to eight years.

4. This order applies only to QFs who sign or have previously signed a Power Purchase Agreement with PGandE and who pay for a detailed interconnection study between the time this order is issued and the time an order is issued in OII 84-04-077 which allocates responsibility for these transmission costs.

5. As a consequence of transmission constraints, PGandE will, at certain times, be unable to physically accommodate delivery of expected energy or capacity in addition to that already committed to by PGandE in certain areas of its transmission system. This situation can be resolved on an interim basis by PGandE undertaking operating practices which PGandE would not undertake without Commission order. This situation can be resolved in the long term by modifications and additions to the PGandE's bulk and area transmission system. Uncertainty as to their potential liability for future costs of such modifications and additions to modify or upgrade PGandE's transmission system makes it difficult for QFs to obtain project financing and, thus,

has a detrimental effect on the development of QF power in Northern California.

6. In issuing OII 84-04-077, the Commission recognized that an extensive investigation is necessary to evaluate fully all of the facts relevant to this matter before the Commission can make a final decision regarding the cost responsibility for the necessary upgrades.

7. The Commission further recognizes that without implementing an interim solution, as much as 800 MW of QF power may not be developed before the final decision in OII 84-04-077.

8. The Commission Staff, PGandE, and other affected parties have stipulated to a proposed interim solution which recommends a course of action that allows QF development to go forward pursuant to Federal and California Law and adopted Commission policy. The parties recognize the risks created by adopting an interim solution prior to completing the investigation.

9. The transmission constraints indicated above apply only to the Northern Portion of PGandE's service territory. No other respondent utility named in OII 84-04-077 falls under the terms of this interim decision. The remaining portion of the PGandE service territory is not affected.

10. The Commission and PGandE continue to support the development of QF power in California in accordance with established law and adopted policies. For this reason, the Commission finds that the benefits of QF power already identified in past Commission proceedings on this subject warrant the sharing of risk by the ratepayer for the costs incurred due to this interim solution.

11. In order to take additional QF power prior to completion of the bulk and area transmission upgrades, PGandE will have to operate its system differently from what is considered to be the most economical dispatch of resources. PGandE needs discretion to take whatever operating measures are necessary at the time. PGandE has not had experience with implementing such measures to accept QF power, so the increase in energy costs which may result from these measures has not been established. PGandE's implementation of any or all of these measures to take

QF power in the interim until the bulk and area transmission upgrades are built shall be presumed reasonable in the annual ECAC review. PGandE will report in its annual ECAC review what steps were necessary to take QF power.

12. PGandE agrees to evaluate expeditiously the bulk transmission system upgrades identified in Table 1 of PGandE's June 1 response to the information requested in OII 84-04-077 (appended as Attachment 1) as well as the Feather River 230 kv system with the intent of preparing Applications for Certificates of Public Convenience and Necessity which are required before those upgrades can be built. If PGandE is unable to build any part of the upgrades because of legislative, judicial, or regulatory action, PGandE will inform the Commission and use its best efforts to propose a course of action that will allow PGandE to continue to accept QF power under contract.

13. PGandE agrees to begin the process of building the area transmission upgrades identified in Table 2 of PGandE's June 1 response to OII 84-04-077 (appended as Attachment 2) with the exceptions of the upgrades listed for Humboldt and Drum Divisions and the Pit 1 System in Shasta Division. These exceptions will be deferred until the completion of the OII. In addition, the Feather River 230 kv System requires an Application for Certificate of Public Convenience and Necessity as described in Finding of Fact 11. If there are projects in these areas currently in licensing procedures before FERC, at the request of the license applicant, PGandE and the CPUC will inform FERC of the current investigation and request that FERC grant an appropriate extension of time.

14. All area system upgrades constructed by PGandE (except the Feather River 230 kv line which requires a separate Application) will be reviewed for inclusion in rate base in the next General Rate Case following their completion to determine only that these upgrades were necessary in order to physically accommodate QF power or for other reasonable and prudent reasons and that the expenditures were reasonable.

CONCLUSIONS OF LAW

1. This interim decision does not predetermine any of the issues in the pending OII 84-04-077 regarding potential transmission constraints of California electric utilities in relation to the development of QF power.

2. San Diego Gas and Electric, Southern California Edison, Sierra Pacific Power and Pacific Power and Light are not bound by this Order.

3. The conclusions drawn as a basis for this interim decision do not bind any of the parties insofar as they may have different positions in the hearings during the investigation.

4. Implementation of the interim decision does not prejudge the ultimate cost responsibility for the proposed transmission system upgrades which will be determined at the conclusion of the investigation in this matter.

5. All discussion, negotiation, and work product associated with the development of, and agreement to, the interim solution are governed by Rule 50 of the Commission's Rules of Practice and Procedure (Title 20 California Administrative Code Section 50).

PROPOSED ORDER

THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED AS FOLLOWS:

1. The Commission hereby issues an interim decision which allows QFs to enter into contracts which permit access to the PGandE bulk and area transmission system between the effective date of this interim order and the completion of OII 84-04-077. The conditions of this interim decision shall apply until there is a further order from the Commission.

2. The interim solution will be applicable only to QFs in the Northern Portion of PGandE's service territory which execute a Power Purchase Agreement and pay for a detailed interconnection study prior to such final decision.

3. The interim solution will not be applicable to QFs which are currently in operation or which have previously executed both

a Power Purchase Agreement *and* an interconnection or special facilities agreement with PGandE or who have been informed in writing by PGandE that there is adequate transmission capacity for their particular project. QFs of 100 kw or less which execute Standard Offer No. 3 are exempt from this order may continue to execute Standard Offer No. 3.

4. The interim solution places in effect an assessment payable by the QF to PGandE of 1.7 mills/kwh. The 1.7 mills/kwh will be payable only on kwh generated at operating levels of up to 60% capacity factor (based on rated nameplate capacity) on a monthly basis. Of this payment, 0.5 mills/kwh is non-refundable and shall be paid until the Commission's final cost allocation decision is effective. In the event the Commission's final decision is that QFs have no cost responsibility, PGandE shall refund in a lump sum without interest the remaining 1.2 mills/kwh which was paid by the QF prior to the Commission's final decision. In the event the Commission's final decision allocates some cost responsibility for upgrades to QFs, but less than 1.7 mills kwh, PGandE shall refund in the manner specified above the difference between 1.7 mills/kwh and the amount fixed by the Commission, but not less than the 0.5 mills/kwh which is not refundable. Thereafter, the QF shall pay the amount fixed by the Commission for the life of the QF project. In no event shall a QF to which the interim solution is applicable have cost responsibility exceeding 1.7 mills/kwh (up to a 60% capacity factor on a monthly basis) for the life of the project.

5. PGandE is to institute whatever operational changes are necessary to accommodate QF power, including non-economic dispatch of resources, to the extent consistent with PGandE's contractual obligations. PGandE will use its best judgment as to how to accomplish the goals of this Order as economically as possible. Any costs incurred as a result of actions PGandE performs under the terms and conditions of the Order shall be presumed just and reasonable for purposes of the reasonableness review in future ECAC proceedings as a recognition of the long term value of QF power to the ratepayer. PGandE shall keep a record of the number of QF projects to which this Order applies, when they come on line, and their hours of operations. PGandE

will report in the annual ECAC review the actions taken by PGandE to accept QF power.

6. This decision does not include the following areas: Humboldt (above 90 MW indicated in Attachment 1), Drum Division and Pit 1 (Shasta Division).

7. PGandE can recover the reasonable costs of all transmission upgrades and operating variations which PGandE undertakes pursuant to this Order.

8. The QF assessment is to be recorded as a credit entry to PGandE's Energy Cost Adjustment Account and will serve to reduce future ECAC revenue requirements.

9. PGandE shall proceed as expeditiously as possible to file an Application with the Commission to obtain a Certificate of Public Convenience and Necessity for the bulk transmission system upgrades (identified in Attachment 1) and for the Feather River 230kv System. PGandE shall also proceed with the remaining area upgrades (identified in Attachment 2) which do not require a Certificate of Public Convenience and Necessity.

10. In each northern area of PGandE's service territory, a limited number of MW of QF development shall be interconnected pursuant to this interim solution. The areas and the approximate associated MW of capacity which will result from reinforcements or additions are as follows:

Shasta Cedar Creek	31
Shasta Battle Creek	54
DeSabla Caribou	140
DeSabla Feather River	50
DeSabla Paradise	75
Colgate	30
North Bay Northern	100*
North Bay Southern	480

* 30 MW maximum can be added prior to completion of upgrades.

If QF participation in the interim solution in a given area reaches the MW level identified above for that area, additional QF projects will be subject to the final resolution of the OII. PGandE shall not be obligated to interconnect, or make commitments to interconnect such QFs until final resolution of the OII.

Drum and Pit 1 — No additional QF interconnection and power deliveries beyond existing transmission capacity are required until final resolution of the OII.

Humboldt — An additional 90 MW of QF projects can be interconnected in this area by altering PGandE local plant operations. The QFs comprising this 90 MW shall be required to participate in the interim solution. The interconnection of additional QF projects, above the 90 MW, shall not be required until final resolution of the OII.

11. Priority rights for the allocation of transmission capacity to QFs eligible under this Order will be on a first-come, first-served basis, as defined in Decision 83-10-093, Ordering Paragraph 12(c). Priority rights for each transmission allocation are not transferable between projects.

12. A QF's right to participate in the interim solution shall be contingent upon its execution of an agreement which reflects the rights and obligations of PGandE and the QF under this Order. Such agreement can, but need not, be part of the Power Purchase Agreement itself.

Respectfully submitted,

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Attorney
Pacific Gas and Electric Company

Respectfully submitted,

DIANE I. FELLMAN
Senior Counsel
California Public Utilities Commission

Respectfully submitted,

JANICE G. HAMRIN, Ph.D.
Executive Director
Independent Energy Producers

Dated: July 3, 1984

ATTACHMENT 1

Table 1

BULK TRANSMISSION REINFORCEMENT COSTS
(In Millions of 1984 Dollars)

Transmission Reinforcement	Reinforcement to Accommodate QFs 496 MW	1,346 MW
1. Rebuild the Vaca Dixon-Contra Costa 230 kV DCTL ($5.4 M to rebuild Vaca Dixon-Peabody Jct. 230 kV DCTL)	$ 5.4	37.2
2. Rebuild the Vaca Dixon-Moraga 230 kV DCTL ($26 M to rebuild Vaca Dixon-American Canyon Junction 230 kV DCTL) (includes building a 115 kV DCTL from Cordelia Junction to Vaca Dixon)	$ 26.0	$ 55.4
3. String a second 230 kV circuit from Gold Hill to Tesla	$ 3.4	$ 3.4
4. Build an additional 230 kV DCTL from Bellota to Tesla	$ 18.2	$ 18.2
5. Add second 500/230 kV transformer bank at Tesla	$N/A	$ 15.5
6. Add 500 MVARS of shunt capacitors in the Bay Area	$N/A	$ 8.0
Total	$ 53.0	$137.7

ATTACHMENT 2

AREA SYSTEM UPGRADES

Division	Cost (In $ Million)
1) Shasta Division	
a) Cedar Creek 60 kV	2.0
b) Battle Creek 60 kV	3.0
2) DeSabla Division	
a) Caribou 60 kV	8.5
b) Feather River 230 kV system	
c) Paradise 60 kV	1.5
3) Colgate Division	
60 kV System	2.5
4) North Bay Division	
a) Northern half (Lake and Mendocino Co's.)	10.0
b) Southern half (Napa, Sonoma, Marin Co. and part of Solano Co. — Sacramento Div.)	10.0
	10.0
	$47.5

APPENDIX B

OII 84-04-077—Excerpt from transcript page 36

ALJ WU: Are you in a position, Mr. Kerler, in which you would be aware of QFs that are interested in interconnecting to the intertie?

THE WITNESS: No sir. Other than my first contact here, I am unaware of any of this outside of the area of QFs.

ALJ WU: Objection is sustained. Again I suggest this is something that PG&E and your client perhaps can agree on.

In terms of whether or not there are many other parties interested in interconnecting on the intertie, it doesn't seem to be something that should be disputed.

MR. LOZOWICKI: We can stipulate as to one, your Honor. I don't think there would be any argument about that.

ALJ WU: Okay.

MR. LOZOWICKI: Q Mr. Kerler, if PG&E wanted to take all of the purchases on the intertie that are plugged into your forecast as shown on Exhibit 3, and were also required to take additional deliveries of QF power on the intertie, would there be an available space on the intertie for both quantities of power?

A No, there would not. Based on the economics of our use of the intertie, any additional — for each additional megawatt of QF that were proposed on our line allocation would back up that megawatt of northwest economy energy.

Q In other words, you don't have — PG&E does not have enough room given the current entitlements to accommodate both what it would like to buy in the way of economy power and QF power that has been tendered by my client?

A Physically, there is a fixed amount of capacity on the intertie. And based on again the economics, we would be displacing a lower cost resource to take a QF megawatt on the intertie.

Q One way of solving that capacity problem would be to build more capacity on the intertie; wouldn't it?

A Additional line capacity would certainly open up additional ability to transmit power into the area.

However, there are times again, even with the additional line capacity, due to minimum load situations, additional capacity may be required to offset lower cost generation in our own area.

Q And part of minimum load in your own area that you are referring to is the QF supplies available in PG&E's —

A Between those periods, they can't be backed down. That is correct.

* * *

OII 84-04-077—Excerpt from transcript page 51

RECROSS-EXAMINATION

BY MR. LOZOWICKI:

Q With regard to your last answer, Mr. Kerler, about your understanding of the Commission's policies, isn't it also true that the Commission has encouraged PG&E and in fact directed PG&E to accelerate the development of small power resources?

A That's correct, in California I believe that's the case.

Q Are you saying that the Commission has distinguished between California small power sources and other sources?

A I am not aware of anything outside the area. So my understanding would be to promote it in California.

Q In other words, the only projects you are familiar with are California projects?

A That's correct.

Q With respect to the available supplies of Northwest power, would you agree that Bonneville Power Administration is in fact the largest supplier of surplus power delivered on the intertie?

A Yes, they are.

Q And would you also agree that the majority of Bonneville's power comes from hydro sources?

A That's correct, it does.

Q So although some other sources are delivered to the intertie, the majority of the power

* * *

OII 84-04-77—Excerpt from transcript page 52

delivered from the Northwest comes from hydro sources, doesn't it?

A Yes, it does.

Q Then finally you mentioned that even if the capacity on the intertie were not being completely used because of minimum load requirements, that to accept QF deliveries on the intertie would cause a further backdown on your takes on the intertie; is that correct?

A That's correct.

Q Now the minimum loads that you are referring to that cause the original backoff include the acceleration supply of QF power in California, doesn't it?

A Yes, it does.

MR. LOZOWICKI: Nothing further, your Honor.

ALJ WU: Anything further for this witness?

(No response.)

ALJ WU: Thank you very much. You are excused.

Off the record.

(Off the record.)

* * *

OII 84-04-77—Excerpt from transcript page 239

Mr. Marcus.

MR. MARCUS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. MARCUS:

Q Mr. Weatherwax, I'm Bill Marcus, and I represent the Independent Energy Producers Association.

Let me first direct the question to the Exhibit 11-D and E that you just passed out.

Is there any statement on either of these exhibits of the number of days in which the intertie was fully loaded during any of the years in question?

A There are not.

Q Let me turn real briefly to page 15 of your prepared testimony.

And I have got a couple of questions on that.

The first goes to your sentence beginning at lines 12 to 14 on page 15.

Does this sentence imply that the Hydropool projects would have had deleterious environmental impacts had they been located in California.?

A I do not believe that it necessarily does.

This certainly says there will be no deleterious environmental impacts within California from there being located in Oregon.

Q So essentially if there are any environmental impacts, we have exported them to the Northwest? In that a fair characterization?

* * *

OII 84-04-077—Excerpt from transcript page 258

Q [Mr. Marcus] On page 7 of your testimony — excuse me. Wrong page.

On page 10 of your testimony at line 20, you speak of this level of average usage, given average weather conditions, there are on average between 200 and 700 megawatts of capacity available.

Is that what your testimony says now that we have gone through the corrections?

A Yes.

Q Does this sentence contain any information on differences in seasonal loadings of the line?

A No.

Q At page 13, lines 6 through 8, does that sentence state that Hydropool during average-to-wet years in the spring runoff result in backdowns of economy energy on the intertie?

A I believe the line states relatively clearly, the three lines, the sentence, that it is likely that during average conditions, there will be times during those spring runoff periods that that would occur.

Q And will there be times within the subset of the spring runoff period where Hydropool power would cause backdown in the intertie — let me back down and ask the question a little more straightforward.

When some of these backdowns that you have identified occur, will there be times when a QF delivering power elsewhere into the PG&E system than

* * *

OII 84-04-077—Excerpt from transcript page 259

on the intertie would not cause the same backdowns?

A [Dr. Weatherwax] The backdowns that I referrred to would occur during the spring flood, based on load imbalance in the northwest and would occur both at times of minimum loads and at other times.

At times of minimum load, the equivalent impact between QFs in California or on the intertie would be identical during certain peak times.

There could be additional backoffs on the intertie from a QF that was connected to it.

Q [Mr. Marcus] So to bring this down to a concrete example, suppose it is 3:00 o'clock in the afternoon and it is a warm day and people are starting to turn the air conditioner on in the month of June, and the intertie is fully loaded.

Taken that general concrete hypothetical, in such a case, would it be likely that PG&E's main system would be marginal on oil and gas, but the Hydropool project could cause backdown on economy energy?

A Would you repeat the question.

Q During a peak on an early summer afternoon — I think it is a compound question. I will break it down.

During a peak summer afternoon, is it likely that PG&E's system marginal fuel would be oil or gas?

A Yes.

* * *

OII 84-04-077—Excerpt from transcript page 292

A [Dr. Weatherwax] I have not done any that is current at this point.

Q [Ms. Cohn] At page 5 of your testimony at lines 27 and 28, you refer to the MOU.

Did the Secretary of Energy approve the MOU as submitted?

A Well, he approved it with a couple of modifications, including the retention of ownership by Western and the allocation of additional 50 megawatt right to certain agricultural interests, I believe, in the San Joaquin Valley.

Q Do you know if the participants have accepted the modifications proposed by the Secretary of Energy?

A I know there are numerous committees ongoing, and I guess there is a very current management meeting of the partici-

pants over which these points are being discussed, presumably, as well as other points.

Q Does that mean that they have not been accepted?

A Well, to the best of my knowledge, they have not, but I would not expect them to be an overwhelming hurdle.

Q Are you relying on that petition of the MOU

* * *

OII 84-04-077—Excerpt from transcript page 350

A [Mr. Malinowski] Well, we currently have an experimental rating for the intertie of 2800 megawatts. The capacitor upgrades that are taking place should provide us the capability to increase the intertie capability to 3200.

Q [Mrs. Fellman] Are you aware of any QFs that currently deliver over the intertie?

A No.

Q In discussions with Ms. Cohn from Edison you stated, or you talked about how the cap would be determined — or perhaps it was Mr. Kerner, I'm sorry.

Are there other criteria that would be used in determining whether or not a QF should be responsible for the cost of building an upgrade besides this cap?

A I think one of the factors is the issue of what are dedicated facilities and nondedicated facilities.

Q In your development of determining whether a facility was dedicated or not, what would be some of the criteria that you would look at in making that decision?

A There we would have to establish where that QF would have to tie to your system in order to get outlet power capability.

It would not always be the nearest substation.

* * *

OII 84-04-077—Excerpt from transcript page 389

A [Mr. Malinowski] Yes, we do need to have that information.

Q [Mr. Hindus] Now, turning to your testimony on page 6, the last paragraph, Mr. Lozowicki asked you a number of questions about your sentence,

> "The 500 kv lines carry some surplus generation and transfer it to the 230 kv system."

Does this mean that there is surplus transmission capacity?

A No.

Q Finally, also in response to questions by Mr. Lozowicki, you indicated that taking 1150 megawatts of QF power could require PG&E to turn back Northwest power.

Do you remember that line of cross-examination?

A Yes.

Q Would you testify that one of the reasons for completing those upgrades is to avoid having to turn back Northwest economy power?

A Yes.

MR. HINDUS: I have no further questions on redirect.

ALJ WU: Is there any recross? Mr. Lozowicki.

MR. LOZOWICKI: Thank you, your Honor.

* * *

OII 84-04-077—Excerpt from transcript page 390

RECROSS-EXAMINATION

BY MR. LOZOWICKI:

Q Mr. Malinowski, regarding the last question counsel asked you, specifically that the reason for the upgrades authorized by the interim stipulation was to avoid the back-off of takes from the Northwest, I take it then that until those upgrades are completed, that one effect of the additional QF generation authorized by the

interim stipulation will be the effect on PG&E's takes of Northwest power.

A We will have to make choices between backing off Northwest and backing off our own generation.

The intent would be that we would do the backdowns in the most economic way.

Q So you have studied those two alternatives?

A We have done some analysis to determine what we'll have to do, yes.

Q In your prepared testimony you mention, at Attachment 8-4, page 1 of 3, in the last paragraph, first sentence,

"With 80 megawatts of PP&L import,"

and there's a certain description about the Battle Creek area, and also on the power flow charts, Attachments 2 through 6, you list in the legend in the left-hand corner PP&L import 80 megawatts.

What does that 80 megawatts refer to?

MR. HINDUS: Objection, your Honor. I don't

* * *

OII 84-04-077—Excerpt from transcript page 391

recall cross-examination even remotely close to this area. This is recross on redirect.

ALJ WU: I agree, Mr. Hindus, but this is an investigation and I'll allow Mr. Lozowicki to ask this question.

MR. HINDUS: Okay.

ALJ WU: Please answer it.

MR. LOZOWICKI: Thank you.

THE WITNESS: Your question is in reference to the 80 megawatts of PP&L imports?

MR. LOZOWICKI: Q Yes.

A We have made provisions to be able to import on our 115 tie to PP&L power in addition to the imports that we might get from the Northwest on the 500.

Q So there's another line that runs in PP&L's territory?

A Yes.

Q And what is the generation source for the imports from PP&L?

A I don't know the specific plants, but they have a number of hydro plants in Northern California and southern Oregon that might contribute to that flow.

Q And that is something, those imports are something that are in your current resource plan?

A They're economy imports, so they would not be included in the resource plan.

* * *

OII 84-04-077—Excerpt from transcript page 392

There's no capacity associated with them.

Q But they are imports that you consider in preparing the power flows for purposes of describing the constraints on the system?

A As far as that particular area is concerned.

MR. LOZOWICKI: Thank you. Nothing further, your Honor.

ALJ WU: Ms. Fellman.

MS. FELLMAN: Thank you, your Honor.

RECROSS-EXAMINATION

BY MS. FELLMAN:

Q Mr. Malinowski, with regard to PG&E actually applying the cap, is it your position that the Commission would have to approve the cap before PG&E would use it?

A Yes, I think we have to be assured that we won't have disallowances if we go forward with such contracts.

Q Do you believe there's an adequate showing in your testimony today for the Commission to adopt your recommended $300 per kilowatt cost cap on construction?

A Yes, I do.

Q Could you please then explain why you would seek Commission advice in determining what the divisor should be of that cost cap that you just mentioned to your counsel?

* * *

OII 84-04-077—Excerpt from transcript page 611

Q [Mr. Hindus] Did PG&E notify you that you didn't need to tender these contracts at all?

A [Mr. Gold] At that time we had a notification from PG&E that nothing had to be done.

We were afraid, however, that other items were taking place, other proceedings, that would affect this if we didn't get a record as having applied for standard offer contracts at that time.

Q So, in fact, you understood these might not be the final documents; you just wanted to make sure you could say you had tendered them.

Is that reasonable?

A We were final as far as we were concerned, unless PG&E didn't want to seek peak and partial peak power in the manner in which we were proposing to deliver it.

Q Let's just review, then, for all the hydro projects in order for the firm capacity payments to be made pursuant to a standard offer.

The power would have to be supplemented either by other Hydropool projects or by firming or shaping power; is that correct?

A Yes.

* * *

OII 84-04-077 Excerpt from transcript page 820

MR. AJELLO: Q At this meeting which you described, didn't you agree that the intertie would not be included in deliveries of out-of-service-area projects?

A [Mr. Gold] I don't think so.

It wasn't my intention to do that.

My only recollection of that settlement meeting which is — that is the brightest recollection I have of that settlement meeting was that it was a total disaster, that nobody agreed to anything, and I have never come up against such hostility as occurred at the meeting.

I basically left that meeting thoroughly depressed, and that we had made no progress whatsoever in our discussions.

And had I gone away from that meeting thinking I had agreed to something, it would have been a difference remembrance because that meeting was one in which we just got nowhere.

Q Did representatives of PG&E state that they would take your power if it was delivered to their service area by means other than the intertie?

A That's a — there are no connections between our projects and — other than the intertie and PG&E's other system, so to some degree we talked about the hypothetical of building your own lines, too, our

* * *

OII 84-04-077—Excerpt from page 821

building our own lines from the system, and based on that I'd have no objection.

I got to qualify that. They said unless they — so long as they were never — they were never connected to the integral — to the integrated transmission system. So that this — this was a point that I asked about: if those lines were interconnected in any way

— if we built a transmission line from our project to another — to one of the PG&E service territories, or northern service areas, for example, if the representative from PG&E said if that was connected in any way to the northwest integrated system, that that would be totally unacceptable, that it had to be a line which did not interconnect on the other side of the project to the integrated system because that would have made — that would have, in effect, as far as he was concerned, turned a radial line into a line connected to the whole loop line.

So if you could do something which again was impossible, build it — you know, isolate the QF from the rest of the northwest system even though it's located in the northwest, building their own line dedicated solely to the QF — from the QF down into one of the northern service territories enumerated in the proposed stipulation, that would be fine as far as he was concerned.

He was willing to make that concession.

* * *

OII 84-04-077—Excerpt from transcript page 857

ALJ WU: All right. Recross, Mr. Hindus?

MR. HINDUS: Thank you, your Honor.

RECROSS EXAMINATION

BY MR. HINDUS:

Q Good morning, Mr. Gold.

You were asked about a meeting on or about July 25th, 1984, in which you were present?

A Yes.

Q And you indicated in response to a question by Mr. Ajello that PG&E agreed that we could take your power peak and deliver to an area line; is that correct?

A If I could deliver it to an area line under very special circumstances.

Q And those circumstances were that it had to be a direct radial connection; is that correct?

A I think that's correct.

Q And PG&E specifically stated that they did not want to open up another connection with another utility?

A That's right.

Q Is it your recollection that the transmission planners who were at that meeting told you the reason they didn't want another interconnection was for stability reasons?

* * *

OII 84-04-077—Excerpt from transcript page 858.

A Yes.

APPENDIX C

Application No. 82-04-44
Application No. 82-04-46
Applica. ı No. 82-04-47

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE
STATE OF CALIFORNIA

Second Application of Pacific Gas and Electric Company for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2

And Related Applications

PETITION FOR MODIFICATION BY COGENERATION SERVICES, INC. AND HYDROPOOL OF DECISION 85-04-075

PETTIT & MARTIN
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Tenth Floor
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May 22, 1985

Attorneys for Cogeneration Services, Inc. and Hydropool, Interested Parties

Application No. 82-04-44
Application No. 82-04-46
Application No. 82-04-47

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE
STATE OF CALIFORNIA

Second Application of Pacific Gas and Electric Company for Approval of Certain Standard Offers Pursuant to Decision No. 82-01-103 in Order Instituting Rulemaking No. 2

And Related Applications

PETITION FOR MODIFICATION BY COGENERATION SERVICES, INC. OF DECISION 85-04-075

I. INTRODUCTION

COGENERATION SERVICES, INC., ("COGEN") is a developer of alternative energy sources. It develops and markets small hydropower and cogeneration projects in California, and other states. COGEN is also a general partner of Hydropool, a partnership which develops similar projects, both in the Northwest and in California. (Both parties hereafter "COGEN"). COGEN appeared as Interested Parties in this case at the November 5 *en banc* hearing and argued against the Staff motion for various modification to Interim Standard Offer 4. RT.1428:7-8. COGEN subsequently filed an opposition memorandum both to the Staff motion and a related motion made orally by PG&E at the *en banc* hearing; and concurrently requested a continuance of the hearings on those motions. COGEN has also participated in workshops held by the Public Staff to discuss the issues in this case.

In addition COGEN has participated as an Interested Party in the "transmission constraints" case, OII 84-04-77. A major issue in that case has been the applicability of the Commission's "Interim Solution Order" to QRs located outside PG&E's service area. See D.84-08-037. Shortly after its issuance, PG&E petitioned to modify the "Interim Solution" so as to exclude fourteen

of COGEN's Northwest QF projects which planned to interconnect on the Pacific Northwest Intertie. In response to that Petition, the Commission first ordered limited rehearings in D.84-11-123; and later ordered consolidation of the Intertie issue with the bulk transmission hearings. See D.85-01-039. Since then, the parties have presented several witnesses and documentary evidence in the course of several hearings. A motion to dismiss is now pending before the Commission.

After the Interim Solution was adopted, COGEN requested interconnection with PG&E and the preparation of standard contracts for the fourteen projects. See Exhibits 1 and 2 attached. Because of the pending Petition for Modification, PG&E refused to process the contracts in the ordinary course. See Exhibit 3 attached. Rather, hearings were set on the Petition. During this time COGEN tendered contracts for each project and proposed execution conditioned upon the outcome of the hearings. See Exhibit 4 attached. PG&E, however, would not accept this proposal.

The Commission's suspension order, D.85-04-075, on its face, would preclude execution of contracts with the fourteen Northwest QFs, even if the Petition for Modification in the constraints case is denied. However, COGEN believes that the fourteen Northwest contracts were not intended to be affected by the Commission's suspension order herein. Rather, because of the unique circumstances, the Northwest QF projects have been suspended pending the outcome of hearings on the Intertie issue and PG&E's Petition for Modification. This "limbo" status existed for eight months prior to the April 17 suspension order. Therefore, the availability of Interim Standard Offer 4 for these projects should rest upon a decision in the Constraints case.

At the Workshop of May 3, 1985 Commission Staff indicated that QFs who were affected by the suspension order should request relief by means of a Petition for Modification. Therefore, the purpose of this Petition is to seek clarification from the Commission that the Decision 85-04-075 would not apply to the fourteen QFs; and that interim Standard Offer 4 may be available to them upon a decision in the Case No. I-84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

II. FACTUAL BACKGROUND

In August, 1984, the Commission issued Decision No. 84-08-037 which approved the Interim Solution for QFs in PG&E's northern area. In that order, the Commission modified a prior stipulation by certain parties to provide that the benefits of the order would extend to all QFs affected by transmission constraints, whether within or without PG&E's Northern service area. *Id.* at page 10, OP No. 1a; FF No.'s 7 and 8. This modification was made upon the motion of several QFs at a prior prehearing conference, including COGEN. *Id.* at page 5. PG&E subsequently petitioned to modify the order so as to exclude QFs interconnecting to the Intertie north of Round Mountain Substation. The only QFs affected by such petition are the fourteen Northwest projects proposed by Hydropool.

Before decision on this Petition, Hydropool requested interconnection and the preparation of contracts for its fourteen Northwest projects. See Exhibits 1 and 2 attached. PG&E refused to process this request, contending that it did not believe the Interim Solution applied to QFs on the Intertie. See Exhibit 3 attached. Thereafter, out of concern with the regulatory lag, Hydropool tendered seven contracts in PG&E's Standard Offer 4 form conditioned upon the outcome of the Petition for Modification. See Exhibit 4, para. 4. PG&E refused to sign any contracts for similar reasons. As described above, the Commission subsequently ordered limited rehearings on the Intertie issue; and later consolidated them with the first phase hearings on bulk constraints. See D.84-11-123 and D.85-01-039. The remaining seven contracts were subsequently submitted and refused.

III. GROUNDS FOR RELIEF

As stated in PG&E's Petition for Modification of D.85-04-075, most of the "orphan contracts" remained unsigned on April 17 because of the "gold rush" of contracts submitted in the last few weeks prior thereto. See PG&E's Petition for Modification 2:14-23 (5/15/85). In effect, PG&E contends that it could not execute all these contracts in due course because of the heavy volume of contracts tendered. *Id.*

Unlike these QFs, PG&E never *began* to process the contracts tendered by Hydropool. In fact, it was necessary for Hydropool to fill out a contract form and tender it to PG&E because of the Utility's unwillingness to prepare formal contract documents, as is customary. Its express reason for doing so was the pendency of rehearings on the Petition for Modification; and its belief that it was not obligated to purchase from QFs delivering on the Intertie. See Exhibit 3. PG&E recognized the unique circumstances: "Because PG&E views Hydropool's position, vis-a'-vis the interim solution, as unique, this reservation of participation is not contingent upon any further action by Hydropool at this time." Exhibit 3, para. 2.

Thus, the reasons for non-execution of these fourteen contracts are very different from those other QFs which could not obtain mutually signed contracts because of the "gold rush." For this reason, and because the lack of execution is due to hearings pending before the Commission, Hydropool does not believe that the Commission intended to include the Northwest projects in its order suspending Standard Offer 4.

Furthermore, to so hold would be grossly inequitable under these circumstances. Hydropool first requested interconnection and Standard Offer 4 contracts on August 7, 1984. The Commission did not suspend Standard Offer 4 until April 17, some eight months later. The sole reason for PG&E's failure to execute these contracts was its pending Petition for Modification, and the ensuing hearings on the Intertie issue. But for the pendency of these hearings it is clear that the Northwest projects would have moved forward and contracts been signed in due course. Utilities have a mandatory duty to sign Standard Offers in Commission-approved form, unless the QF requests negotiated terms. D.84-08-031, p.61, Op#3. Thus, it is only the regulatory lag time which has placed these fourteen QFs under the suspension order.

If the Commission denies the Petition for Modification (as it should) and allows the Northwest projects to proceed under the Interim Solution it would be grossly inequitable to deny to them the form of contract which was available and would have been executed but for the Petition for Modification. Otherwise, such a

result would penalize a QF after it had relied on a Commission order and because a utility chose to fight the issue.

IV. CONCLUSION

For the reasons stated herein, COGEN respectfully requests that the Commission modify D.85-04-075 to provide that the suspension of Standard Offer 4 does not apply to the fourteen Hydropool projects totaling 66.2 megawatts; and that interim Standard Offer 4 may be available to them upon a decision in Case No. I.84-04-077 denying PG&E's Petition for Modification of D.84-08-037.

Dated: May 22, 1985. Respectfully submitted,

PETTIT & MARTIN

By: /s/

Edward B. Lozowicki
Attorneys for Cogeneration Services, Inc. and Hydropool, Interested Parties

APPENDIX D

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

* * *

OII No. 85-11-008

Investigation on the Commission's own motion into the desirability of power purchases from cogenerators and small power producers located outside of the purchaser's service area or outside of California and the terms and conditions which should be applied to such purchases.

ORDER INSTITUTING INVESTIGATION

[Filed Nov. 6, 1985]

By this order, the Commission begins an investigation of electric capacity and energy purchases by Pacific Gas and Electric (PG&E), Southern California Edision (SCE), and San Diego Gas and Electric (SDG&E), from cogenerators and small power producers, otherwise known as qualifying facilities (QFs), located either outside the utilities' service areas or outside of California.

QFs located in the Pacific Northwest, the Southwest, and California's Imperial Valley want to wheel power to California utilities and take advantage of higher avoided cost rates than are offered by utilities in their regions. However, the actual avoided costs paid to out-of-service area and out-of-state QFs may differ from the avoided costs paid to other California QFs. If QFs wheel power over interties, their power might displace economy energy purchases which would cause economic harm for California's ratepayers. Maintaining ratepayer indifferences, as a result of accurate avoided cost, may require additional curtailment provisions or a different pricing structure than is available to in-service area QFs.

As part of I.84-04-077, the Commission adopted D.84-08-037 which authorized an interim solution to allow QFs to continue development in the northern part of PG&E's service area during

completion of transmission capacity upgrades and additional new lines.

Cogeneration Services, Inc. (Hydropool) sought to wheel power from projects in the Pacific Northwest to PG&E over the Pacific Intertie under the terms of the interim solution. In D.85-09-058, the Commission decided that the Pacific Intertie should be excluded from the interim solution but that the issue of purchases from out-of-state QFs deserved further study. Ordering paragraph No. 4 states:

> "4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place."

Since many of the issues that apply to out-of-state QFs, such as the use of interties, also apply to QFs in the Imperial Valley and other remote areas of California, the scope of this investigation is expanded to include QFs located in the state but outside the purchasing utilities' service area. For these reasons, we are making the major electric corporations respondents to this general investigation.

Therefore, good cause appearing,

IT IS ORDERED that an investigation on the Commission's own motion is hereby instituted into the desirability of purchasing power from QFs located outside the service area of the purchasing utility or outside the state for the purpose of determining:

1. the extent to which unlimited power purchases resulting from interconnection of out-of-service area QFs would cause displacement of economy energy from the Northwest and Southwest;

2. the feasibility of developing pricing and curtailment options to assure that the true costs avoided by QFs are measured, including the forgone opportunity of the use of transmission lines for other sources;

3. additional contract terms needed to allow purchasing utilities to track the progress of out-of-service area QFs for resource planning purposes;

4. an evaluation of the circumstances, if any, under which it would be appropriate to make standard offers available to out-of-service area QFs and the form of such offers; and

5. the potential discriminatory and anti-competitive effects of accepting or not accepting out-of-state QFs with the possibility for economic harm or no economic harm to the California ratepayers; and

6. additional contract terms and conditions and other factors which would negate or ameliorate against any potential economic harm to the California ratepayer.

IT IS FURTHER ORDERED that each electrical corporation named and interested parties shall file with the Commission's Docket Office by November 25, 1985 an original and 12 copies of a statement addressing each of the above issues and listing additional issues that should be included in the investigation. A prehearing conference will be scheduled to set forth the issues and schedule for this proceeding.

The Executive Director is directed to mail a certified copy of this order to the respondents and to cause a copy of this order to be mailed to all appearances in A.82-04-044 *et seq* and I.84-04-077.

Dated November 6, 1985, at San Francisco, California.

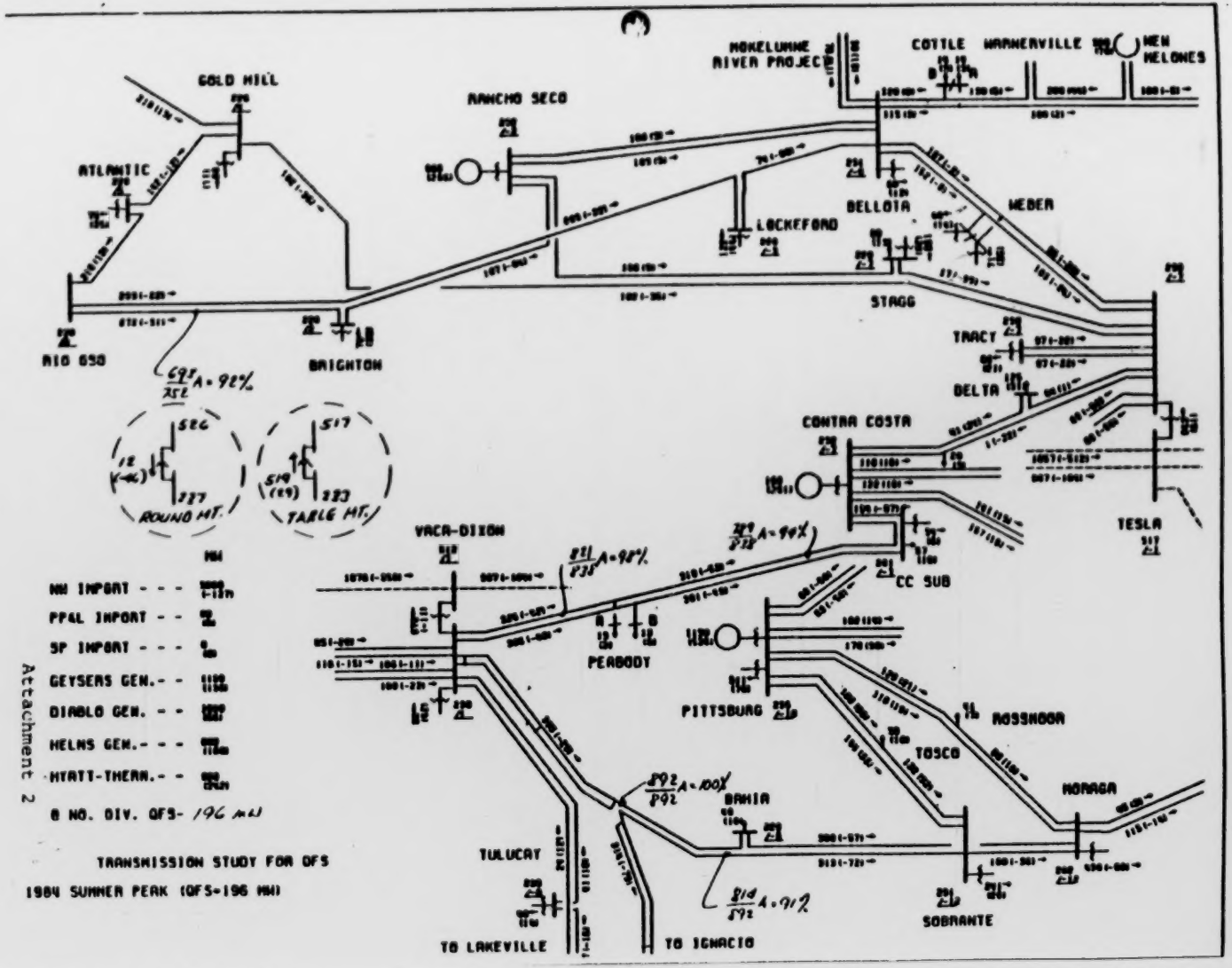
DONALD VIAL
President
VICTOR CALVO
PRISCILLA C. GREW
WILLIAM T. BAGLEY
FREDERICK R. DUDA
Commissioners

APPENDIX E

OII 84-04-077
April 8, 1985
Exhibit 20

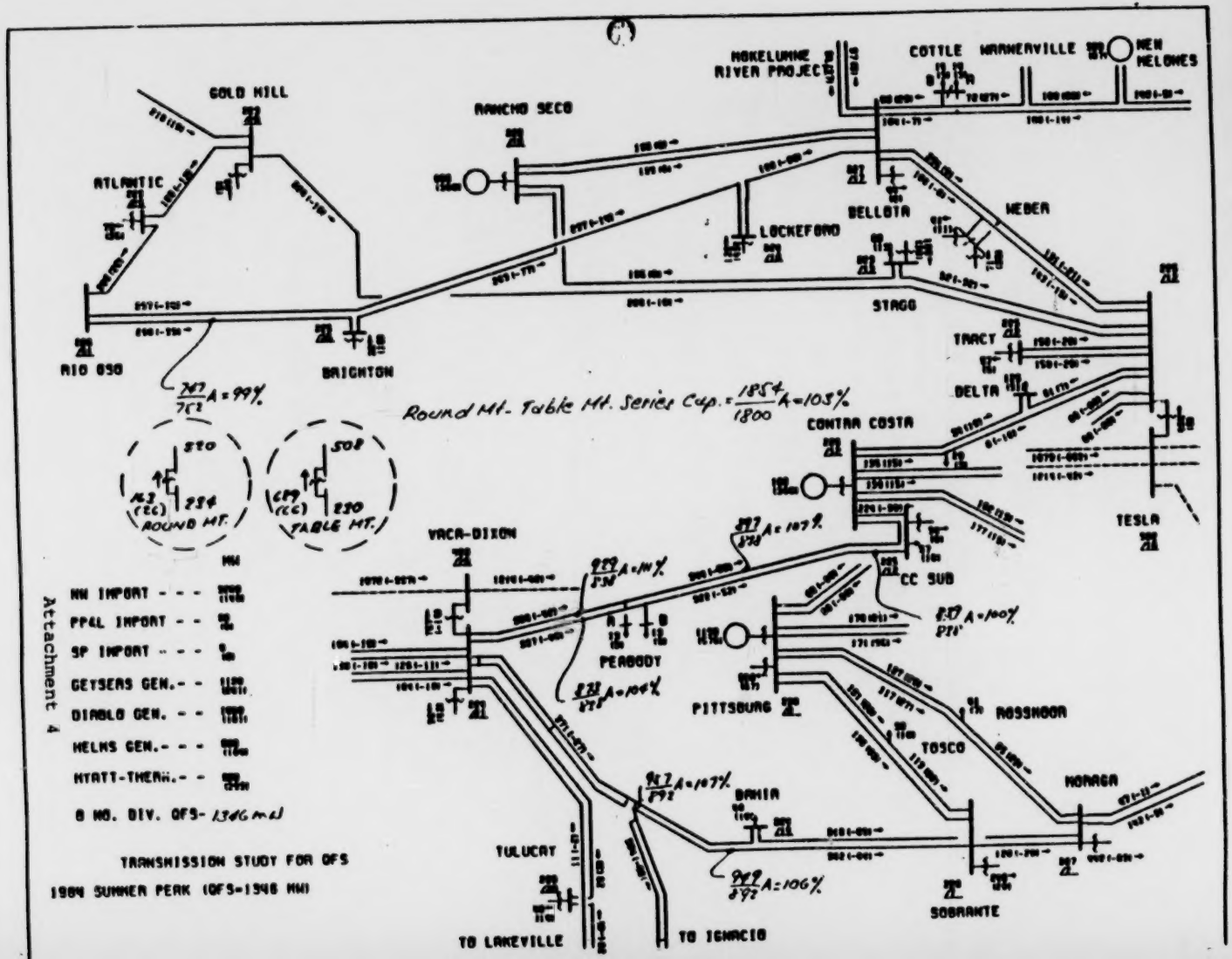
PACIFIC GAS AND ELECTRIC COMPANY

EXCERPT FROM
PREPARED TESTIMONY OF
JAMES H. MALINOWSKI



Attachment 2

BEST AVA



Attachment 4

AILABLE COPY

EXHIBIT NO. 13

APPENDIX F

OII 84-04-077

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on cogeneration and small power production development.

EXCERPT FROM

EXHIBITS SPONSORED BY

IVAN LEWIS GOLD

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Attorneys for Cogeneration Services, Inc. and Hydropool, Interested Parties

(LETTERHEAD)

San Francisco
November 16, 1984

BY HAND DELIVERY

Thomas Jefferson
Pacific Gas and Electric Co.
77 Beale Street
Room No. 2312
San Francisco, CA 94106

RE: Hydropool Projects

Dear Mr. Jefferson:

This will follow up on our letter to Pacific Gas and Electric Company of September 25, 1984, and PGandE's letter to Hydropool of September 25, 1984, regarding the above. Hydropool is concerned that it does not yet have power purchase agreements or interconnection questionnaires from PGandE for its projects. Recent events in the PUC suggest that any further delay in obtaining signed agreements may seriously prejudice our ability to move forward with the projects.

Accordingly, we are tendering herewith signed power purchase agreements for seven of the projects previously discussed. We will provide standard offers for the balance of our projects in the immediate future. We have selected the "firm capacity" payment option for the six (6) hydroelectric projects and one (1) cogeneration project. As we discussed, we will provide PGandE supporting information to justify the firm capacity election. In the event the information as finally prepared is inadequate or would support a firm capacity rating too low for our purposes, you have agreed we can elect as-delivered forecast capacity prices. In any event, our filing today is intended to place us on record as subscribing for

PGandE Standard Offer Number 4, energy payment option 2, and firm capacity or as-delivered capacity option 2 (as the case may ultimately be), at the price levels in effect today.

Please forward to us interconnection questionnaires and an estimate of the cost of an interconnection study for these projects. Because the point of interconnection for all the projects will be Malin, we believe only one interconnection study will be necessary. On that assumption, we attach a check for sixteen thousand dollars ($16,000) as a "flat rate" payment for such a study. We will complete and return the questionnaire upon receipt from you.

As previously mentioned, we are willing to make the power purchase agreements final, subject to a decision from the PUC regarding PGandE's petition for modification of Decision #84-08-037. In this regard, you have agreed not to negotiate our check without advising us.

Please sign the attached Receipt of Service and return it to Hydropool. We understand you will return typewritten versions of the attached Standard Offers for our signature. Your cooperation in these matters is greatly appreciated.

Very truly yours,

/s/

Ivan L. Gold

ILG:ba
Enclosures

APPENDIX G

Excerpt from:
Decision 83-10-093, October 19, 1983
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application 82-03-26
(Filed March 8, 1982)

Application of PACIFIC GAS AND ELECTRIC COMPANY for Approval of Certain Standard Offers Pursuant to Decision 82-01-103 in Order Instituting Rulemaking No. 2.

Application 82.03.37
(Filed March 8, 1982)

SOUTHERN CALIFORNIA EDISON COMPANY, application for 3 standard offers for purchase of electric power from cogeneration and small power production facilities.

Application 82-03-62
(Filed March 16, 1982)

Application of SIERRA PACIFIC POWER COMPANY, for approval of its standard offer to purchase cogeneration and small power production facilities.

Application 82-03-67
(Filed March 18, 1982)

Application of PACIFIC POWER & LIGHT COMPANY for Approval of Certain Standard Offers Pursuant to Decision 82-01-103 in Order Instituting Rulemaking No. 2.

Application 82-03-78
(Filed March 22, 1982)

In the Matter of the Application of SAN DIEGO GAS & ELECTRIC COMPANY for an Order by the California Public Utilities Commission Directing SDG&E to Purchase Power From Qualifying Facilities Based on Standard Offers and to Make Certain Changes or Additions to its Tariffs Affecting Purchases from Qualifying Facilities.

Application 82-04-21
(Filed April 8, 1982)

Application of CP NATIONAL CORPORATION for approval of certain standard offers pursuant to Decision 82-01-103 in Order Instituting Rulemaking No. 2.

OIR 2
(Petition for Modification
Filed September 10, 1982)

Rulemaking on the Commission's own motion to establish standards governing the prices, terms, and conditions of electric utility purchases of electric power from congeneration and small power production facilities.

(See Decision 82-12-120 for appearances.)
Additional Appearances

George M. Galloway, Attorney at Law, (Oregon), for Pacific Power & Light Company, applicant.

Matthew V. Brady, Attorney at Law, for Arcata Lumber Company; *Arthur C. Fegan,* for CP National Corporation; and *Nicholas R. Tibbetts,* for Congressman Douglas H. Bosco, First Congressional District-California; interested parties.

Page No. 75

B. Varying the Standard Offer

Another issue involving the language of the standard offers in general is the impact of making only minor changes in the terms. Several of the parties to this proceeding have urged that a contract containing terms which deviate slightly from the approved standard offer should be treated the same as a standard offer. For the utilities, this result would mean the assured recovery of costs related to such a contract, which would be considered reasonable per se. For QFs, it would mean the ability to particularize an agreement without any need for Commission approval or the alteration of other contract terms.

One approach recommended by CMA is for the Commission to identify certain terms of the standard offers which would be negotiable. For these terms, the Commission could define a range

of reasonableness and, as long as the parties' negotiations fell within this range, the resulting contract would be considered a standard offer.

PG&E, who also seeks this Commission's clarification of the boundary between standard and nonstandard offers, suggests that the utility should be able to alter nonprice provisions of the standard offer without jeopardizing the offer's status. Nonstandard contracts, in PG&E's view, would include contracts which provide levelized or fixed energy prices, floor prices, or debt guarantees. PG&E also seeks explicit Commission authorization for utilities to extend pricing provisions and associated conditions of approved nonstandard contracts to other QFs without the risk of nonrecovery of utility costs.

In its brief, the staff responded to these various suggestions based on its understanding of this Commission's findings in D.82-01-103:

> "First, the Commission stated that negotiated contracts should be 'the economic equivalent of the standard offer.' (p. 91.) Many terms in the standard offer can be altered slightly, or in some cases substantially, without affecting the economic balance contemplated in the standard offer. Staff believes that utilities should not hesitate to make such alterations in their offers to specific QFs if such alterations further the goal of increasing alternative energy production. When the economic balance of the standard offer is altered by a changed term, the statement of the Commission suggests that a compensating adjustment is required to reinstate the economic balance of the standard offer. It should be recognized, however, that the economic balance contemplated in the standard offer is not so fragile that it will not withstand minor adjustment. Staff believes that utilities should make such minor adjustments when appropriate. As the Commission stated, once the Commission has reviewed a contract, including the standard offers involved in this proceeding, for consistency with avoided cost principles, utilities should be expected to sign similar contracts without Commission review, even if such contracts are nonstandard in the narrow legal sense. (p. 104.)" (Staff's Brief, p. 110.)

The staff has correctly summarized this Commission's view of variations from the standard offer. One of the reasons for describing several different standard offers in D.82-01-103 was to illustrate to the utility and QFs the package of terms and conditions which we would find reasonable and under which the recovery of utility costs would be assured. We did not claim, however, that the offers so described would necessarily define all of the reasonable combinations of terms and conditions which could govern a QF power purchase.

Not only do we acknowledge the difficulty of identifying all reasonable permutations of the standard offer, but we also find impossible our providing initial review and approval of all of the contracts whose terms may vary from the standard offer. The utilities nevertheless ask us to guarantee their recovery of all costs associated with these contracts. Our obligation to safeguard the interests of the ratepayers leads us to deny this request. To some extent, a utility's concern that its costs may be disallowed provides the utility with an incentive to consider the interests of its ratepayers in its negotiations with QFs. Further, the risks of nonrecovery become proportionately less when the variations from the standard offer are only slight.

We do not wish, however, for a utility's concern over the nonrecovery of costs to paralyze its activities with QFs. We believe that we have already taken steps in D.82-01-103 to allay the concerns of both the utilities and the QFs. First, we have allowed the utilities to bring nonstandard contracts before us for our review Second, we have obligated the utilities to negotiate with QFs in good faith.

This approach appears to have worked well so far. The utilities have been negotiating vigorously and successfully with QFs. We have now received and approved several forms of standard offers, as well as a number of nonstandard contracts. The totality of our actions should provide the utilities with a fairly clear picture of what agreements we would consider reasonable. Under these circumstances, it is unnecessary for us either to make portions of the standard offers negotiable or to extend standard offer status to those contracts whose terms vary from those of the standard offer.

Additionally, PG&E's request that utilities should be authorized to alter nonprice provisions without jeopardizing the standard offer status creates an artificial distinction between price and other terms of the contract. Changes in nonprice terms can have very real economic effects on ratepayers and the parties to the contract. As we stated in our earlier decision, we are concerned that the economic balance represented by the standard offer should be maintained in negotiated contracts. That economic balance is not limited to the exchange of dollars between the parties.

Finally, we note that the current form of the standard offer may in fact change in the future. We hope and expect that experience in this developing industry will lead to refinements, improvements, and perhaps elaborations of the standard offers. We believe that the process of negotiation between QFs and utilities will provide us with some important information on changes to the standard offers. Because we do intend to limit standard offer status, but also recognize the legitimacy of the utilities' concerns, we will continue to allow utilities to bring nonstandard contracts to us for our review under the same circumstances which currently govern that review.

APPENDIX H

I.84-04-077
(Filed April 18, 1984)

Decision 85-09-058, September 18, 1985 As Modified by Decision 86-02-033, February 5, 1986

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California electric corporations regarding transmission constraints on congeneration and small power production development.

(See Decisions 84-08-037 and 85-01-038 for prior appearances.)

Additional Appearances

Ann P. Cohn, David N. Barry, III, and Jennifer Moran, Attorneys at Law, for Southern California Edison Company, respondent. Graham & James, by *James Squeri,* Attorney at Law, for Union Oil Company of California; *Neal A. Johnson,* for California Waste Management Board; *Robert Logan,* for himself; *Alicia Torre* for International Power Technology; and *Margaret Rueger,* for U. S. Windpower, Inc.; interested parties.

OPINION

I. Summary

By this order, we close an investigation into transmission limitations in utility systems which may affect the development of Qualifying Facilities (QF). We find that Pacific Gas and Electric Company (PG&E) may have significant constraints in its northern system. The other two utilities, Southern California Edison Company (Edison) and San Diego Gas & Electric Company (SDG&E), should not have significant transmission constraints.

II. Background

On April 18, 1984, the Commission issued Order Instituting Investigation (I.) 84-04-077 to examine alleged transmission constraints in PG&E's transmission system which would affect QF development. The Commission also wanted to assess the extent of any limitations in other utilities' transmission systems which would affect QF development.

The respondent utilities filed statements of anticipated limitations on their bulk and area transmission systems over the next ten years which may affect QF development. In these statements, only PG&E predicted that it would have significant constraints in its northern transmission system.

After submission of the utilities' statements, the Public Staff Division (staff) held several workshops at which an interim solution was developed for PG&E's northern transmission system, a milestone procedure for QF development was formulated, and transmission cost allocation approaches were discussed. (See Decision (D.) 84-08-037 and D.85-01-038.) The participants in the staff's workshops were able to resolve several issues and thereby reduce the need for formal hearings.

Hearings were held from April 8-12, 1985 on three subjects: utilities' transmission constraints, cost allocation approaches, and access to the Pacific Northwest-Pacific Southwest 500 kilovolt (kV) Intertie (Intertie) under the terms of the interim solution (see Appendix A). PG&E, Edison, SDG&E, Santa Fe Geothermal, Inc. and Ultrasystems, Inc. (Ultrasystems), Independent Energy Producers (IEP), Cogeneration Services, Inc.-Hydropool (Hydropool), and staff presented witnesses. Concurrent briefs were filed by May 24, 1985.

III. Transmission System Limitations

A. PG&E's Transmission System

1. Transmission Constraints

James H. Malinowski, PG&E's Chief Transmission Planning Engineer, testified that transmission capacity is not currently

available in some areas of PG&E's northern system. Malinowski stated that from 1980 to 1984, the megawatts (MW) of signed QF contracts increased from 204 MW to 6,593 MW. Malinowski asserted that this unexpected increase in QF power exceeded available transmission capacity in its northern system.

According to Malinowski, the availability of transmission capacity is dependent on existing and future load levels as well as existing and future generation. In PG&E's northern area, generation consists of area hydro, imports, geothermal, Rancho Seco, other entities, and QFs. This anticipated generation will exceed the expected load during certain hours of each year for the next ten years.

In PG&E's southern area, the company is monitoring the development of large enhanced oil recovery projects to determine if capacity constraints will emerge.

Malinowski sponsored the following table showing that the northern system already has a resource-load imbalance:

Load, Excluding System Line Losses (MW)
and
Resources, Excluding Northwest Import (MW)

Main Area	Installed Capacity	Typical Resources On Line	Peak Load	Surplus Resources	Resources Needed to Meet Load
Northern	8,892	7,290	5,328	1,962	—
Bay Area	4,670	2,232	5,540	—	3,308
Southern	7,290	5,366	5,062	304	—

Northern Area includes SMUD and Humboldt, Shasta, Colgate Drum, De Sabla, North Bay, Sacramento, and Stockton Divisions.

Bay Area includes San Francisco, East Bay, and San Jose Divisions.

Southern Area includes MID, TID, and San Joaquin and Coast Valleys Divisions.

Malinowski stated that most of the northern area's 1,962 MW of surplus resources will be transmitted to meet Bay Area load.

According to Malinowski, this transfer of power will fully load some bulk transmission lines. As a result, any additional QF power in the northern area would cause these transmission lines to overload.

PG&E has conducted a study to determine which lines would be overloaded during the summer peak and the spring partial peak periods. This study showed that the existing bulk transmission system had no available capacity for firm deliveries of QF power. Malinowski testified that under normal conditions the following 230 kV lines and 500 kV capacitors would be overloaded:

a. Gold Hill-Tesla
b. Rancho Seco-Tesla
c. Bellota-Tesla Nos. 1 and 2
d. Tracy-Tesla Nos. 1 and 2
e. Vaca-Dixon-Contra Costa Power Plant (CCPP) Nos. 1 and 2
f. Vaca-Dixon-Moraga Nos. 1 and 2
g. Round Mountain-Table Mountain 500 kV series capacitors.

Malinowski also testified that constraints exist in several area transmission systems within the northern system. In most of these areas, which are rural or suburban, the load and expected load growth is small compared to urban areas. Consequently, existing transmission lines are of relatively low capacity. In addition, the area generation often exceeds the area load. The following table shows the available transmission capacity in the northern areas:

Sub Area	Load (MW) Maximum	Load (MW) Minimum	(MW) Existing and Planned Generation	(MW) Maximum Export
	(A')	(A)	(B)	(C)= (B-A)
Humbolt Division Includes Trinity County — Shasta	130	40	128	88
Pit 1 System	19	5	106	101
Cedar Creek 60 kV Area	3	1	7	6
Battle Creek 60 kV Area	3	2	38	36
Caribou 60 kV Area	75	34	78	44
Feather River Area	0	0	339**	339
Paradise 60 kV Area	40	16	38	22
Colgate 60 kV Area	52	17	417	365***
North Bay North	220	132	245	113
North Bay South	865	519	2,132	1,613
Drum Division	4	2	174	172

Sub Area	(MW) Existing Transmission Capacity	(MW) Available Transmission Capacity	(MW) Potential Of Generation**** Allocated	(MW) Potential Of Generation**** Wait List
	(D)	(E)-(D-C)		
Humbolt Division Includes Trinity County — Shasta	88	0-90*	90.0	136.5
Pit 1 System	106	5	4.5	40.0
Cedar Creek 60 kV Area	16	10	27.0	0.5
Battle Creek 60 kV Area	36	0	4.5	4.0
Caribou 60 kV Area	84	40	70.0	20.0
Feather River Area	390	51		
Paradise 60 kV Area	37	15	0.5	63.0
Colgate 60 kV Area	365	0	20.5	12.0
North Bay North	113	0	20.0	59.0
North Bay South	1,613	0	382.0	862.5
Drum Division	172	0	20.0	7.3

* 90 MW available if Humboldt Bay units 1 and 2 are backed down.

** Includes 44 MW of import from the Caribou 60 kV area.

*** B - A'

**** List as of February 8, 1985.

2. Transmission Upgrades

Malinowski testified that two groups of transmission upgrades to its bulk transmission system have been identified. The first group will provide transmission carrying capability for an additional 1,150 MW of QFs interconnecting under the terms of the interim solution. (See D.84-11-123 modifying D.84-08-037.) These bulk upgrades, their estimated cost, and expected operating dates are as follows:

Potential Bulk Transmission Upgrades
For First 1,150 MW of Added QF Power

	Estimated Cost (in Million of 1984 Dollars)	Expected Operating Date
String a second 230 kV circuit from Gold Hill to Tesla	3.4	March 1988
Add about 500 MVARS of shunt capacitors	8.0	June 1989
Build an additional 230 kV DCTL from Bellota to Tesla	18.2	December 1989
Rebuild the Vaca-Dixon-Contra Costa 230 kV DCTL	37.2	December 1990
Rebuild the Vaca-Dixon-Moraga 230 kV DCTL	55.4	June 1991
Add second 500/230 kV transformer bank at Tesla.	15.5	June 1992
Total	137.7	

The second group of bulk upgrades will accommodate the transmission requirements of an additional of 2,000 MW of QF power in the northern area. Approximately 2,000 MW of QFs are on a PG&E waiting list for transmission capacity in the northern area. These upgrades and their estimated cost are as follows:

Potential Bulk Transmission Upgrades For Another 2,000 MW of Northern QF

	Estimated Cost (in Millions of 1984 Dollars)
Upgrade Round Mountain series capacitors	$ 26.1
Build new Table Mountain — Tesla section of the 500 kV line and install series capacitors and transformer banks at both ends	154.8
Replace conductors of Weber-Tesla section of the Bellota-Tesla 230 kV DCTL with SSAC	7.5
Add two circuits of two 3,500 kcmil cables at the underground section of Castle Rock Junction-Lakeville line	5.4
Rebuild the Lakeville-Vaca-Dixon 230 kV DCTL with 2-1113 kcmil AAL conductors	27.8
Total	$ 221.6

Finally, Malinowski described planned area transmission upgrades as follows:

Area Reinforcements

	Area Reinforcements				
	Transmission Capacity (MW)				
Area	Available	To Be Added	Estimated OD	Cost* $ x 1000	$/Kilowatt (kW)**
Pit 1	5	100	1988	9,000	90
Cedar Creek	10	38	1987	4,400	116
Battle Creek	0	25	1987	2,000	80
Caribou 60 kV & Feather River	40	100	1990	13,500	135
Paradise	15	50	1987	3,000	60
Colgate	0	30	1988	2,500	83
North Bay North	0	80	1988	5,500	69
North Bay South	—	—	—	—	—

* In 1985 dollars.

** $/kW of area transmission capacity added — excludes $199/kW of bulk transmission costs.

U.S. Windpower, Inc. (USW) in its brief stated that PG&E has provided incomplete information on transmission constraints in the Altamont Pass area. Malinowski during cross-examination testified that there are transmission constraints in this area. He further stated there is a waiting list of at least 700 MW of QFs

desiring transmission capacity in this area.[1] USW observes that PG&E has not provided examples of planned upgrades which will relieve these constraints in Altamont Pass.

B. Edison's Transmission System

Edison does not expect to have any transmission limitations during the ten-year period ending in 1994 that will constrain QF development. E. M. Helm, Senior Planning Engineer, testified that the company's Fall 1984 Generation Resource Plan has 3,250 MW of renewable and alternate resources for the period 1985-1994. Helm stated that Edison has planned to develop its transmission system to accommodate these QF facilities. Accordingly, Edison does not expect any major difficulty in integrating QFs into its resources.

C. SDG&E's Transmission System

SDG&E also does not anticipate any bulk transmission constraints in its service territory which will limit QF development over the next ten years. Ronald Erdman Busher, Supervisor of Transmission Planning, identified two areas which have potential limitations: Boulevard and Warner Springs. However, Busher further testified that the actual QF development in these two areas will not surpass the line capacity in these areas. Thus, SDG&E believes there also are no significant area transmission limitations in its system.

IV. Transmission Cost Allocation

After studying the utilities' evaluations of their transmission systems, the parties examined transmission cost allocation approaches. The staff held a workshop to see if the parties could agree upon a basic allocation of most transmission upgrade costs

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[1]By letter dated July 3, 1985, counsel for PG&E informed the administrative law judge (ALJ) that certain transmission lines in the Altamont Pass area have been "uprated" to accommodate most of the QFs on the waiting list.

to utilities and their ratepayers. General agreement was reached; however, minor differences arose during the hearings.

The staff, through its witness Julian Ajello, stated that utilities have the responsibility for anticipating the growth of QF resources. Utilities also must plan and construct adequate transmission capacity. Ajello emphasized that QFs are a significant portion of utility resource plans and therefore must be considered in utility transmission plans. Ajello further stated that the cost of transmission capacity which has multiple purposes is a legitimate ratepayer expense. Thus, staff believes the cost of transmission lines or upgrades should be allocated to ratepayers unless the transmission facility does not serve multiple purposes.

PG&E believes that the reasonable cost of nondedicated facilities necessary to take QF power should be paid by ratepayers. However, PG&E's witness Malinowski asked the Commission for guidance on the reasonableness of a transmission facility cost. Malinowski suggested that a cost cap of about $150/kW could be used as a guideline for determining reasonable area transmission costs. Malinowski explained that the company really was seeking Commission approval of the concept of a cap as a guideline and not for the fixing of a particular cap.

Edison urges the Commission to approve the company's current allocation under which the QF pays for transmission facilities which are directly related to or required by QFs. If an upgrade is not directly required by or solely beneficial to a QF, the QF has no cost responsibility. In other words, as Edison's witness Helm stated, if a transmission facility has system benefits, then the QF need not pay for it.

SDG&E asserts that its analysis of a transmission facility's cost is the same for QFs, all other resources, and customers. SDG&E analyzes the following factors for each transmission line:

1. Future system growth needs
2. System security and reliability
3. Emergency support
4. Economy energy access

5. Transmission losses
6. Transfer capability
7. Firm resources at system peak conditions
8. Cost effectiveness

SDG&E believes that each transmission line or upgrade must be evaluated under the above criteria. SDG&E submits there is no need for the Commission to change the company's existing transmission planning method.

IEP asserts that it is the utility's obligation to plan and to build transmission upgrades or lines when there are benefits to ratepayers. IEP submits that as a general rule most transmission upgrades or lines will have system benefits and therefore should be paid for by the utility's ratepayers.

IEP asks the Commission to adopt a cost cap to provide some certainty about QF access to transmission. IEP proposes that any transmission project undertaken at an estimated expense below the cost cap would be presumed reasonable. In this way, IEP asserts a QF will have an indication of what transmission lines should be built by the utility to accept QF power.

IEP's witness Jan Hamrin testified that a cap of about $180/kW is appropriate for all utilities' area transmission lines. Hamrin agreed with PG&E's witness Malinowski that all bulk transmission lines have generalized system benefits. Accordingly, a cost cap for bulk transmission lines is unnecessary since the ratepayers always are responsible for these lines.

Ultrasystems submits that a cost cap for transmission projects should not be adopted. Ultrasystems states that the adoption of a cost cap would assume a long-run avoided cost for the utility which has not yet been determined. Ultrasystems argues that until the long-run avoided cost methodology is determined, a transmission cost cap cannot be adopted.

Pacific Lighting Energy Systems (PLES) agrees that QFs should not be responsible for transmission facilities which have system-wide benefits to customers. PLES points out that this general concept is expressed in several ways by the different

utilities. Accordingly, PLES recommends that the Commission adopt Edison's language as the standard for all utilities to avoid different applications by the utilities.

In addition, PLES submits that a cost cap, if adopted, should be used only as a general guideline in assessing the reasonableness of a transmission project. PLES emphasizes that a QF should have the right to come to the Commission if a utility refuses to build a transmission upgrade or line because its cost exceeds the cost cap.

V. Refund of Interim Solution 1.7 Mills/ Kilowatt-hour (KWh) Assessment

PG&E and staff recommend that since QFs should not be held responsible for the cost of most transmission upgrades, 1.2 mills/kWh should be refunded from any payments received under the terms of the interim solution. In addition, the 1.7 mills/kWh charge should be reduced to .5 mill/kWh prospectively. The interim solution provided that 1.2 mills/kWh of the 1.7 mills/kWh is refundable if the Commission determines that QFs have no cost responsibility. However, PG&E believes the interim solution is unclear as to what QFs should pay after the Commission's decision is issued. PG&E and staff assert that it is equitable for QFs to continue paying .5 mill/kWh over the life of the contracts since the QFs are receiving the benefits of transmission access before the transmission upgrades and lines necessary to accommodate their deliveries are completed.

The QFs maintain that no assessment is appropriate after the Commission issues a decision finding that QFs usually will have no cost responsibility. The QFs assert that the Commission cannot in "good conscience" assess a continuing charge of .5 mill/kWh, no matter how small, after it determines that QFs are not responsible for transmission upgrades or lines.

VI. Discussion

A. QFs generally are not responsible for the cost of transmission upgrades or lines.

QF deliveries are a significant part of each utility's resource plan. Accordingly, utilities must plan for and otherwise enable QF facilities to interconnect with their transmission systems in an expeditious manner. We recognize that both the diversity and the number of emerging QFs in PG&E's system have created new problems for the company's transmission planners. However, PG&E along with the other utilities must learn to facilitate the addition of QF power as it already has learned to accept power deliveries from all other resources.

The parties have agreed among themselves that QFs should not be responsible for the cost of transmission facilities which serve multiple purposes. The parties find since the ratepayers in the past have paid for these transmission facilities, the ratepayers should continue to absorb the cost as long as the transmission facility has system-wide benefits. A QF is responsible only for interconnection and other facilities that have no system-wide benefits and are solely beneficial to the QF. This approach eliminates the need for a difficult cost allocation among the various users of a transmission facility.

System-wide benefits can mean many things as shown in SDG&E's list of factors affecting its transmission planning. Thus, we believe that nearly all transmission facilities arguably may have some system-wide benefits. Bulk transmission lines by definition have system-wide benefits. And nearly all area lines probably will have some system-wide benefits. Thus, QFs will assume cost responsibility only on the rare occasion that an area line lacks any perceptible system-wide benefit.

On occasion, a transmission facility's cost may outweigh its system-wide benefits. In this event, the QF perhaps should be responsible for any excessive cost caused by the interconnection of its facility to the utility's system. A rigorous cost-benefit analysis, however, touches upon many as yet undefined criteria. We have yet to determine a long-run avoided cost methodology for QFs. We have not yet adopted consistent energy reliability

criteria for all utilities. The cost of transmission service is just one piece to the puzzle of properly valuing QF power. Thus, for the moment, we will allow utilities to follow the general principle that as long as a transmission facility has system-wide benefits, the utility's ratepayers are responsible for the prudent and reasonable cost. The QF is responsible only for interconnection cost and other special facilities which have no system-wide benefits. Refinement of this principle must await our determination in the long-run avoided cost proceedings.

B. A transmission cost cap can be a useful guideline for utilities and QFs.

PG&E has asked for Commission approval of the concept of a cost cap. PG&E's witness Malinowski carefully explained that a cost cap would help PG&E in its transmission planning for QFs as a benchmark of costs that will be absorbed by ratepayers. However, Malinowski went on to say that PG&E would continue the same analysis in its transmission planning that would occur without the guideline of a cap. The concept of a cost cap is attractive but the calculation of the level of a cap involves many of the previously mentioned criteria which are not well-defined. To the extent a cost cap will be added to PG&E's existing analysis and will not become an accepted substitute for the usual study of a proposed transmission facility, it may refine and improve PG&E's current transmission planning process. Thus, we will permit PG&E to develop a cost cap and use it as a tentative guideline in its planning.

We caution PG&E that its calculation of a cap may be examined by QFs and staff. The level of a cap may vary greatly depending on the selected assumptions. The information underlying the derivation of any cap should be shared with all interested parties. A QF may, by complaint to the Commission, allege that a selected cap is unreasonable and thereby bring the reasonableness of the utility's calculation into issue.

C. A .5 mill/kWh assessment should continue until the transmission upgrades associated with the interim solution are completed.

Under the terms of the interim solution, 1.2 mills/kWh of the 1.7 mills/kWh assessment is refundable if the Commission finds the QFs have no cost responsibility for transmission upgrades. Since we have determined that QFs have virtually no responsibility for transmission facilities with system-wide benefits, 1.2 mills/kWh clearly should be refunded.

Since QFs participating in the interim solution will receive access to transmission before the associated upgrades are completed, we find it is reasonable to continue a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed. The payment is a minimal offset to the potential diseconomies identified by PG&E. However, since PG&E has stated that the diseconomies will end once the upgrades are completed, there is no reason to continue the assessment beyond the completion date. Therefore, as each upgrade is completed, the QPs whose delivery was constrained by that line no longer should be liable for a .5 mill/kWh charge.

D. PG&E's Petition to Modify the Interim Solution to Exclude the Intertie should be granted.

Deleted per Decision No. 86-02-033.

~~The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling and grant PG&E's Petition to Modify D.84-08-037. We find after reviewing the evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution. We do not reach the larger question of whether and, if so, under what conditions QFs ever should have access to the Intertie.~~

~~Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. Issues to be~~

~~addressed in that proceeding will include, but will not be limited to:~~

Per Decision No. 86-02-033, the following language was substituted for the first two paragraphs under Section "D".

> "The ALJ issued a ruling in which he concluded that no further hearings were necessary on QF interconnection to the Intertie under the terms of the interim solution (see Appendix A). We hereby affirm the ALJ's ruling, incorporate it by reference herein, and grant PG&E's Petition to Modify D.85-08-37. We find after reviewing the evidence that there is an adequate basis for excluding the Intertie from the terms of the interim solution.
>
> "We stated in D.85-06-163, the Orphan Contracts decision, that resolution of PG&E's Petition to Modify would determine the ability of Hydropool to enter Standard Offer 4 agreements with PG&E. Our decision to grant PG&E's Petition means, of course, that Hydropool does not have the ability to enter Standard Offer 4 agreements under the terms of the interim solution, as long as its interconnection is through the Intertie. We note that we need not reach the issue of whether Hydropool's Standard Offer 4 tenders complied with all requirements prior to our having prospectively suspended Standard Offer 4.
>
> "We stress that this decision does not determine *access* to the Intertie. No one has declared that Hydropool cannot use the Intertie to deliver power to PG&E. The dispute is one over the price which must be paid for that power. The evidence in this case supports our decision, made in response to a documented, critical but temporary situation of transmission system constraints, not to make Standard Offer 4 prices available to *any* QF interconnecting with the Intertie. The record nowhere indicates and, in fact, contradicts any notion that either the Commission, the Commission staff, the respondent utilities, or any QF ever contemplated that our Standard

> Offers applied to such interconnection, particularly in such circumstances. We do not know whether the institutionalized avoided cost of Standard Offer 4 is appropriate for a situation where, because of the Intertie interconnection, a QF's power of necessity will always displace economy power from the Northwest whenever such power is available to fill PG&E's capacity entitlement. We do not believe PURPA requires such a result, without convincing evidence that PG&E's avoided cost in such a situation is indeed equivalent to the Standard Offer 4 price.
>
> "Finally, we do not reach the larger question of whether, and, if so, under what conditions, QFs ever should have access to the Intertie under a Standard Offer type of option. Instead, we find that a separate proceeding should be established to consider the broader issues of out-of-service area and out-of-state QF power in the context of how to utilize our scarce interstate transmission resources for the maximum benefit of the ratepayers. Issues to be addressed in that proceeding will include, but will not be limited to:"

1. the extent to which unlimited power purchases resulting from interconnection of out-of-state QFs would cause displacement of economy energy, especially from the Northwest;

2. the feasibility of developing pricing and curtailment options to protect ratepayers from paying uneconomic prices to out-of-state QFs should we determine that out-of-state QFs ought to be given an opportunity to serve the California power market;

3. a comparison of California and non-California avoided costs, to provide a perspective on the relative attractiveness of California as a market for out-of-state QF power; and

4. an evaluation of the circumstances, if any, under which its would be appropriate to make standard offers available to out-of-state QFs and the form that such offers should take.

By examining the problems of how to deal with out-of-state QFs in a generic proceeding, we will avoid the risk of reaching a

conclusion on these issues based on the necessarily incomplete record and limited perspective raised in the current proceeding in which the focus was exclusively on Hydropool's projects. The question of whether Hydropool should be granted access to the Intertie will appropriately become part of the more general question of the terms and conditions, if any, under which out-of-state QFs should be allowed interconnection.

Findings of Fact

1. PG&E expects to have significant constraints in its northern transmission system during the next ten years which may affect QF development.

2. Edison and SDG&E do not expect to have any significant transmission constraints over the next ten years.

3. The parties agree that transmission facilities which have system-wide benefits should be paid for by ratepayers.

4. The parties agree that transmission facilities which lack system-wide benefits and are beneficial only to the QF should be paid for by the QF.

5. Bulk transmission lines have system-wide benefits and should be paid for by ratepayers.

6. Nearly all area transmission lines will have system-wide benefits and should be paid for by ratepayers.

7. A rigorous cost-benefit analysis of a transmission facility is dependent on criteria yet to be defined in other Commission proceedings.

8. QFs participating in the interim solution should be refunded 1.2 mills/kWh but should continue to pay a .5 mill/kWh assessment until the transmission upgrades associated with the interim solution are completed.

New Finding of Fact 8a (added pursuant to Decision 86-02-033):

8a. "D.85-06-163 stated that resolution of PG&E's Petition to Modify the interim solution by excluding the Intertie

would determine the ability of Hydropool to enter Standard Offer 4 agreements with PG&E."

9. The Intertie is different from other constrained transmission lines in PG&E's northern system since (1) QF interconnection to the Intertie may cause greater displacement of economy power than QF interconnection to other lines, (2) QF interconnection to the Intertie will affect PG&E's negotiations of power purchase deliveries over the Intertie, and (3) PG&E has never represented to QFs that interconnection to the Intertie would be acceptable without price adjustments or curtailment provisions.

10. This investigation should be closed so that the parties may devote their attention and resources to the pending OIR 2 proceedings and the determination of long-run avoided cost for QFs.

Conclusions of Law

1. Ratepayers in the past have paid for transmission facilities which serve multiple purposes. Ratepayers should continue to pay for transmission facilities which have system-wide benefits.

2. QFs participating in the interim solution should continue to pay a .5 mill/kWh assessment until the transmission upgrades which are intended to eliminate operating diseconomies are completed.

3. A rational basis exists for excluding the Intertie from the terms of the interim solution.

New Conclusions of Law 3a and 3b (added pursuant to Decision No. 86-02-033).

3a. "PG&E's Petition to Modify D.84-08-037 to exclude the Intertie from the terms of the interim solution should be granted."

3b. "Granting PG&E's Petition to Modify will have the effect of determining that Hydropool does not have the ability to tender Standard Offer 4 contracts to PG&E under the terms of the interim solution, but will not have the effect of excluding Hydropool from the Intertie under some other pricing arrangement."

4. The Commission should establish a separate proceeding to investigate the unresolved questions relating to the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place. The issue of whether Hydropool should be granted interconnection for its projects should be taken up in this new proceeding.

ORDER

IT IS ORDERED that:

1. Utilities shall require QFs to pay only for transmission facilities which lack system-wide benefits and are beneficial only to QFs.

2. QFs participating in the interim solution shall be refunded 1.2 mills/kWh and shall continue to pay .5 mill/kWh until the transmission upgrades associated with the interim solution are completed.

3. Pacific Gas and Electric Company's Petition to Modify D.84-08-037 is granted to exclude the Intertie from the terms of the interim solution.

4. The Legal Division shall prepare an order instituting investigation to evaluate the desirability of purchasing power from out-of-state QFs and the terms and conditions under which any such purchases should take place.

5. I.84-04-077 is closed.

This order becomes effective 30 days from today. Dated September 18, 1985, at San Francisco, California.

DONALD VIAL
President
VICTOR CALVO
FREDERICK R. DUDA
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate.

I will file a written dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

I.84-04-077
(Filed April 18, 1984)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the transmission system operations of certain California Electric corporations regarding transmission constraints on cogeneration and small power production development.

Appendix A

ADMINISTRATIVE LAW JUDGE'S RULING

Introduction

On April 12, 1985, counsel for Pacific Gas and Electric Company (PG&E) moved to dismiss the proceeding insofar as it involved the right of Hydropool — Cogeneration Services, Inc. (Hydropool) to interconnect to the Pacific Northwest — Pacific Southwest 500 Kv Intertie (Intertie). San Diego Gas and Electric Company (SDG&E) and the Commission's Public Staff Division (staff) moved to strike the evidence offered by Hydropool.

The Commission in Decision (D.) 84-11-123 granted a limited rehearing on the question of Qualifying Facility (QF) interconnection to the Intertie under the terms of an interim solution for transmission constraints in PG&E's service territory. Hearings were held on December 17, 1984, March 28-29, 1985, April 9, 10, and 12, 1985. John E. Kerler, Supervising Power System Engineer, testified on behalf of PG&E. Dennis E. Peseau, Senior Vice President and Senior Economist of Zinder Companies, Inc., Robert K. Weatherwax, Jr., President of Sierra Energy and Risk Assessment, Inc., and Ivan Gold, President of Cogeneration Services, Inc. and managing parnter of Hydropool, all testified on behalf of Hydropool. Further hearings were suspended until a ruling is issued on the motions.

PG&E, other utilities, and staff have argued that the intent of the signatories to the interim solution is the only relevant factor. They intended to exclude the Intertie from the interim solution.

Accordingly, they assert Hydropool or any other QF has no right to interconnect to the Intertie under the terms of the interim solution.

PG&E's witness Kerler explained why PG&E has excluded the Intertie from the interim solution. Kerler testified that at the time the interim solution was drafted, PG&E believed no firm capacity on the Intertie would be available for QFs. If QFs were allowed to interconnect to the Intertie, PG&E believed that the QFs would displace cheaper economy power from the Northwest.

PG&E asserts that the QFs which are allowed to interconnect to constrained bulk or area lines under the interim stipulation will cause only temporary operating diseconomies since transmission upgrades have been identified for those lines. Thus, PG&E agreed to allow QF interconnection to those lines because the company believes the lines' capacity can be increased and the diseconomies will end.

PG&E evaluation of the Intertie is quite different. PG&E has never believed that firm capacity on the Intertie will be available. Consequently, the company consistently has refused to give QFs any access to the Intertie.

Hydropool responded to PG&E's showing by attempting to show that excess capacity will be available on the Intertie and that other QFs could cause displacement of Northwest economy power.

Hydropool's witness Peseau testified that firm surplus resources in the Northwest and very favorable water conditions have resulted in high utilization of the Intertie in the last four years. Leseau asserted that the Northwest's large surplus should diminish and average water conditions should return in the future. He concluded that the declining firm surplus with average water conditions should not fill the expanding capacity of the Intertie.

Hydropool's witness Weatherwax examined PG&E's long range plans and determined that PG&E should not use all of its Intertie capacity over the course of any year for the next 20 years. Weatherwax stated that if Hydropool is permitted to interconnect its projects to the Intertie there will not be a one-to-one displace-

ment of Northwest economy power. In addition, Weatherwax testified that other QF projects may cause displacement of Northwest economy power during minimum load conditions. Thus, Weatherwax asserts Hydropool is similar to other QF projects in its impact on the PG&E transmission system.

Hydropool's witness Gold testified that the only economic market for the Hydropool projects is in California and the Intertie is the only transmission path for these projects. Without Commission approval, Gold stated that Hydropool's projects will not be built.

PG&E Motion to Dismiss

PG&E raises several grounds for dismissing Hydropool's claim in this proceeding. PG&E argues that Hydropool is not entitled to a QF contract, that Hydropool's marketing agreements are not legal under PURPA, and that Hydropool has failed to comply with Decision (D.) 84-08-037. In addition, PG&E maintains that no unlawful discrimination has been shown by Hydropool.

PG&E asserts that since Hydropool is not the owner or operator of its cogeneration and small power production facilities, Hydropool is not a QF under PURPA. PG&E points out that Hydropool is a broker or agent for QFs as it owns only a de minimis 2.5% holding in one facility.

Furthermore, PG&E claims Hydropool even lacked authority to execute power purchase agreements on behalf of the developers. PG&E asserts that Hydropool's marketing agreements with developers provide that Hydropool is merely to deliver power purchase agreements to the developer for the developer's execution.

PG&E submits that Hydropool is a broker for power and is not a QF. Accordingly, PG&E believes Hydropool's claim should be dismissed.

PG&E next argues that Hydropool's marketing agreements provide for deliveries of utility power at QF prices. The marketing agreements contain "shaping" provisions which permit substitu-

tion of a "shaping" utility's power for the QF's generation. PG&E submits that this "shaping" substitution clearly violates PURPA.

PG&E argues that Hydropool has not complied with the interim solution as approved by the Commission in D.84-08-037. The interim solution provided that priority rights for each transmission allocation are not transferable between projects. PG&E points out that only seven of the fourteen projects mentioned by Hydropool to PG&E in August, 1984, are still being pursued. PG&E asserts Hydropool has substituted other projects for some of the original projects in violation of D.84-08-037.

Finally, PG&E submits that no discrimination has been shown by Hydropool since no QF has been allowed by PG&E to deliver over the Intertie. PG&E points out that Hydropool was offered an opportunity to deliver power on a radial line to a PG&E area transmission line. Furthermore, PG&E claims that it has denied the request of another QF to interconnect to the Intertie. Thus, PG&E concludes that Hydropool has been treated in the same manner as other QFs.

Hydropool Response

Hydropool asks the Commission to deny PG&E's motion for several reasons.

First, Hydropool asserts that PG&E failed to make its motion upon five days written notice as required by Rule 56. Hydropool claims PG&E has known of Hydropool's agency relationship with its projects as early as November, 1984. Therefore, Hydropool argues PG&E's motion is improper and should be denied.

Hydropool also asserts that it was expressly authorized to act as agent for QF project owners. Hydropool claims that the owners verbally authorized its agency authority and subsequently ratified Hydropool's actions.

Hydropool points out that it has never received a transmission allocation under the interim solution since PG&E consistently has denied all requests for interconnection to the Intertie. Therefore, Hydropool submits it has not improperly shifted an allocation between projects.

Finally, Hydropool maintains that all QFs participating in the interim solution may cause displacement of Northwest economy power. Thus, Hydropool asserts that the seasonal displacement of Northwest economy power is not a valid basis for excluding only Hydropool's projects from the interim solution.

SDG&E and Staff Motion to Strike

SDG&E moved to exclude the testimony of Hydropool witnesses Peseau and Weathervax. Counsel for SDG&E argues that the interim solution rationally differentiates between classes of QFs. He asserts the Intertie is significantly different from the rest of PG&E's transmission system and is propertly excluded from the interim solution. To SDG&E, interconnection to the Intertie is a price issue which should be addressed in another proceeding.

Staff joined SDG&E in moving to strike the testimony of Peseau and Weathervax. Staff believes the only relevant issue is the intent of the interim solution. Staff further argues that Hydropool's witnesses have not shown that one-to-one displacement of economy power will not occur if its projects interconnect to the Intertie.

Discussion

The purpose of the interim solution was to enable QFs in PG&E's constrained northern transmission system to proceed with their projects until these constraints are relieved by transmission upgrades and new transmission lines. The terms of the interim solution were limited to QFs located within PG&E's service territory. The Commission in D.84-08-037 removed the in-service area restriction and stated: "At this time, we do not have sufficient cause to differentiate between QFs located within PG&E's service territory and those located beyond the utility's service boundaries."

PG&E immediately filed a petition for modification of D.84-08-037 asserting that it intended to exclude the Intertie from the interim solution because interconnection to the Intertie could result in one-to-one displacement of economy power. PG&E also asserted that this displacement would not be relieved by planned

transmission upgrades or new transmission lines. PG&E then asked the Commission to exclude the Intertie from the interim solution as a matter of policy.

The Commission declined to exclude the Intertie from the interim solution and instead ordered a limited rehearing on this matter. (See D.84-11-123.)

The issue addressed in the limited rehearing is whether PG&E's proposed exclusion of the Intertie from the interim solution is a reasonable distinction among its constrained transmission lines or unlawful discrimination against a class of QFs.

The California Supreme Court in *United States Steel Corp. v Public Utilities Commission*, 29 Cal, 3d 603 (1981) set forth some guidelines for the Commission's determinations on claims of discrimination. The Court affirmed the Commission's wide discretion in prescribing economic classifications but stated that mere administrative inconvenience may not justify an imprecise classification. The Court observed that the Commission's finding of administrative "difficulty" to support a rate exemption was inadequately supported by record evidence. (29 Cal. 3d at 614.) Here it is unlikely that the mere declaration of the signatories' intent would be considered a sufficient basis for the exclusion of one transmission line and QFs in proximity to that line from the interim solution.

The record for this proceeding now contains sufficient evidence for a Commission finding. Prior to hearing, the Commission lacked any evidence apart from a PG&E petition alleging that permanent one-to-one displacement of economy power could result from QF interconnection to the Intertie. At hearing, PG&E was required to present a witness to substantiate its claim. Hydropool was permitted to cross-examine and was given an opportunity to present rebuttal witnesses. In addition, PG&E stated it wants to present additional evidence should the Commission find that its initial presentation is lacking.

The salient facts developed in the record are as follows.

In recent years, PG&E's capacity entitlement on the Intertie was fully utilized due to above average hydro conditions. Based on

this recent experience, the company may predict that all of its capacity on the Intertie could be used in the next few years. Assumption of average hydro conditions would lead to a different conclusion, i.e., capacity will be available most of the year. However, at times such as during the spring run-off months, the Intertie will be fully used even under average hydro conditions. If allowed to interconnect, Hydropool's projects will displace economy power at these times.

The QFs allowed to interconnect to other constrained transmission lines also may cause displacement of economy power on the Intertie. Under minimum load conditions, surplus area generation may be transmitted from the northern area to the Bay Area over the Intertie. To the extent QF deliveries in the northern area cause a resource-load imbalance, these QFs may displace economy power deliveries over the Intertie if other PG&E resources are not curtailed.

PG&E has claimed that the operating diseconomies expected under the interim solution are temporary. However, the transmission upgrades associated with the interim solution will not relieve a capacity constraint on the Intertie. Thus, the diseconomy of Intertie back-offs may continue after these upgrades are completed.

PG&E never has allocated firm capacity on the Intertie to a QF. PG&E instead has offered to purchase QF power delivered on the Intertie on an interruptible basis or at prices competitive with economy power.

From these facts, one may find a few differences between QF interconnection to the Intertie and to other constrained transmission lines. First, direct interconnection to the Intertie obviously will displace economy power whenever such power is available to fill PG&E's capacity entitlement. Interconnection to other transmission lines will cause displacement only when such economy power is available *and* uncurtailed area generation exceeds area load. Consequently, the amount of displacement from QF interconnection to the Intertie may exceed any Intertie back-off caused by other QF interconnection to other lines. Second, direct interconnection will reduce PG&E's available firm capacity on

the Intertie in its negotiations of long term capacity contracts in the Northwest. Other QF interconnections to other lines will not alter PG&E's negotiating posture. Third, PG&E never has represented to QFs that it would accept firm QF deliveries on the Intertie without price concessions. On the other hand, until PG&E's discovery of unforeseen constraints in its northern transmission system, PG&E expected QF interconnection to other transmission lines to occur under the various approved standard offers in the ordinary course of business. Thus, there is a basis for distinguishing the Intertie from other constrained transmission lines.

Ruling

The objective of this proceeding and the interim solution has been to allow QF development to proceed despite the unforeseen transmission constraints in PG&E's northern transmission system. This objective has been reasonably met by the interim solution without unlawful discrimination against a class of QFs. No further hearings are required on the issue of QF interconnection to the Intertie under the terms of the interim solution. The Commission may modify D.84-08-037 to exclude the Intertie from the interim solution as requested in PG&E's petition for modification. Alternatively, the Commission may deny PG&E's petition and allow Hydropool to participate in the interim solution as a matter of policy.

The various motions to strike or exclude Hydropool's evidence are denied as the Commission should issue a decision based on findings drawn from this evidentiary record. PG&E's objections to Hydropool's standing as a QF will be addressed if the Commission should find that QFs should be allowed to interconnect to the Intertie under the terms of the interim solution.

Dated July 30, 1985, at San Francisco, California.

/s/ RANDOLPH L. WU

Randolph L. Wu
Administrative Law Judge

APPENDIX I

California Administrative Code Title 20
Section No. 63

63. (Rule 63) Authority. The presiding officer may set hearings and control the course thereof; administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. He may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission.

California Public Utilities Code
Section No. 451

451. All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

California Public Utilities Code
Section No. 1709

1709. In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

California Public Utilities Code
Section No. 1757

1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of

the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission or reasonableness and discrimination.

Code of Federal Regulations
18 C.F.R. § 292.401(a)

§ 292.401 Implementation by State regulatory authorities and nonregulated electric utilities.

(a) *State regulatory authorities.* Not later than one year after these rules take effect, each State regulatory authority shall, after notice and an opportunity for public hearing, commence implementation of Subpart C (other than § 292.302 thereof). Such implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart (other than § 292.302 thereof).

Code of Federal Regulations
18 C.F.R. § 292.304(c)(ii)

(c) *Standard rates for purchases.* (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(i) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.